No. 12,527

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

v.

JUNEAU SPRUCE CORPORATION (a corporation),

Appellee.

BRIEF OF APPELLEE

HART, SPENCER, MCCULLOCH, ROCKWOOD & DAVIES,
MANLEY B. STRAYER,
JAMES P. ROGERS,
1410 Yeon Building,
Portland 4, Oregon,

FAULKNER, BANFIELD & BOOCHEVER,
Post Office Box 1121,
Juneau, Alaska,

Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND 10-50

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ANSWER TO JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement contains one misleading statement. The first pleading on behalf of appellants was a general demurrer filed November 20, 1948 (Tr. 15). The special appearance and motion to quash service of summons was not filed until January 3, 1949. The printed record does not disclose the date of filing of the motion to quash, although it does reveal that the affidavit in support of the motion was sworn to on December 27, 1948, over a month after the demurrer was filed (Tr. 14). The motion was filed before the court had ruled on the demurrer, and both motion and demurrer were overruled by the same order (Tr. 21, 22).

ANSWER TO APPELLANTS' STATEMENT OF THE CASE

Appellants' statement of the case seems designed to convey the impression that the issue litigated was whether the longshoremen were entitled to the work of loading appellee's barges. At least, some of the assertions concerning the evidence in the case appear to have no purpose except to imply that the longshoremen were rightfully entitled to the work and that appellee acted in an arbitrary manner in refusing their demands. In the interest of accuracy we have taken issue with appellants as to what the evidence was in this regard. We wish to emphasize, however, that these were immaterial matters. There was no issue at the trial as to which union organization was entitled to the work in question, for it was conceded that appellee had assigned the work to its regular sawmill employees and that appellants had not been certified by the National Labor Relations Board as the bargaining representative of appellee's employees. This satisfied the statute's requirements concerning the right to the work.

Appellants' statement of the case contains numerous inaccurate and misleading statements. On page 7 of appellants' brief it is stated:

> "Certain of the evidence at the trial was conflicting, but since the verdict of the jury was in favor of the appellee, all such conflicts are resolved in favor of the appellee in the following summary."

Appellants then set forth a purported statement of facts which is not only erroneous and incomplete in many

respects, but actually resolves questions of fact in favor of the appellants. In order to set this case in proper perspective for the consideration of the various errors assigned, we deem it desirable to set forth a correct statement of the facts which were conceded or which the jury might have found from the evidence.

Early in 1947 appellee purchased from Juneau Lumber Mills, Inc., a sawmill and other properties in Alaska, and on May 2, 1947, commenced operation of the sawmill at Juneau, Alaska. During the early stages of its operation the bulk of its sales were made to the Army Engineers, which took delivery of the lumber at appellee's dock. Other deliveries were made to commercial steamers, and a small amount to fishing boats and cannery tenders.

In September, 1947, the Army Engineers canceled its contract (Tr. 183). Appellee then acquired barges and tug boats for the purpose of shipping its lumber to ports in the United States and Canada (Tr. 184). The barges were also to serve as auxiliary storage yards made necessary by the limited storage capacity at the millsite (Tr. 187). Appellants' statement on page 9 of its brief that appellee used longshoremen to load lumber on its vessels is not borne out by the record. It was the uniform policy of appellee from the outset to use its regular sawmill employees exclusively in the loading of all company-owned equipment (Tr. 176-179). It was hardly feasible to do otherwise in loading barges since the work was intermittent and an integral part of the sawmill operations (Tr. 186, 254, 255).

At the time appellee purchased the properties in Alaska, it assumed no collective bargaining or labor agreements of its predecessor (Plaintiff's Ex. 1, Tr. 117). The employees at the sawmill were, for the most part, members of Local M-271 of International Woodworkers of America (hereinafter referred to as I. W. A.). Shortly after the commencement of operations I. W. A. requested the appellee to negotiate a contract with it (Tr. 125). When I. W. A. had established to the satisfaction of appellee that it represented a majority of the workers, appellee agreed to recognize it as the exclusive bargaining representative and commenced talks looking toward the execution of a contract (Tr. 129, 130, 144). The contract was finally executed on November 3, 1947, and included all employees of the company, regardless of the work they were doing, with certain exceptions not material here (Tr. 130, 302, Plaintiff's Ex. 2). It was expressly agreed that the I. W. A. recognition clause in the contract included all yard employees, when loading barges as well as when performing yard work (Tr. 302, 303), and that the sawmill workers would load everything, including barges, where appellee's equipment was used (Tr. 302, 303, 357). This agreement was made after I. W. A. officials had conferred with their International and had received an opinion that they were entitled to include such work (Tr. 349, 551, Plaintiff's Exs. 8 and 9).

On several occasions prior to the execution of the contract with I. W. A., representatives of both appellants requested that appellee negotiate with them coast wise and local contracts under which longshoremen

would perform various work, including the loading of barges (Tr. 150-159, 161-165, 183, 188, 192, 574). They admitted, however, that they did not represent any of appellee's employees (Tr. 192, 298). They were told that appellee had recognized I. W. A. as the exclusive bargaining representative for all of its employees (Tr. 160, 189) and that it would not sign a contract with any other union (Tr. 299).

The first barge load of lumber was loaded by appellee's sawmill workers and shipped in October, 1947. Although threats were made by the longshoremen that this barge would not be unloaded (Tr. 221, 299), it was in fact unloaded without incident. The mill was closed during the winter months of 1947-1948, but in March, 1948, appellee commenced the loading of another barge (Tr. 202). At this time representatives of Local 16 called upon appellee and again demanded the work of loading the barges (Tr. 201, 202). When this request was refused, representatives of Local 16 presented its claim to the work to a meeting of I. W. A. (Tr. 391). Local 16 announced its intention of establishing a picket line at appellee's plant if it could not get the barge loading, and asked the sawmill workers to respect the picket line (Tr. 396, 397). By means of false representations Local 16 prevailed upon the sawmill workers to agree to give up the barge loading and respect the picket line "until more could be found out about the situation" (Tr. 393-397, 414).

The barge loading was a comparatively small part of the work and the jobs of about 265 men were at stake (Tr. 267). The members of I. W. A. agreed to relinquish

the barge loading because they feared the mill would be shut down and they would lose their jobs (Tr. 484); because they wished to avoid trouble (Tr. 849); because they feared violence if they should go through the picket line threatened by the longshoremen (Tr. 873); because they feared the effect of being blacklisted (Tr. 848); and because they were deceived by appellants into the belief that the longshoremen were also employees of appellee and entitled to the work (Tr. 407).

When appellee refused to accede to the demands of the longshoremen, a picket line was established at appellee's plant on April 10, 1948. Appellee's employees refused to cross the picket line, as the result of which refusal the mill was forced to shut down until July 19, 1948 (Tr. 310).

During the interim repeated and continuing efforts were made to induce the longshoremen to remove the pickets and permit the mill to operate. The Mayor of Juneau appointed a fact-finding committee to investigate and attempt to resolve the dispute (Tr. 964). A representative of appellant I. L. W. U., Mr. Albright, attacked the Mayor's recommendation as "an employer inspired publicity dodge" (Pl. Ex. 17, Tr. 781). It was proposed that the dispute be submitted to the National C. I. O. Council, but this suggestion was rejected by Mr. Albright (Tr. 426). An officer of the I. W. A. International and a representative of the United States Mediation and Conciliation Service came to Juneau to attempt a settlement (Tr. 417, 418). A proposal was made to them by appellee which might have resolved the dispute, but at the last moment it was rejected by Mr.

Albright on orders from the San Francisco headquarters of I. L. W. U., because it was felt that the settlement might establish a bad precedent for the longshoremen (Pl. Ex. 6, Tr. 419-426). Throughout the period appellants maintained a pretense of desiring to "negotiate", but they meant by use of that term nothing short of capitulation to their demands (Tr. 525-528).

During the time the mill was closed Mr. Albright, the I. L. W. U. International representative for Alaska, acted as spokesman for the Longshoremen (Tr. 432). He spoke at meetings of appellee's employees, urging them not to cross the picket line, advising them that if they did so they would be blackballed and that in any event their jobs would be temporary because the company would be unable to unload its lumber (Tr. 444).

The sawmill workers were anxious to return to work, but were uncertain whether they should do so (Tr. 539, 541). They discovered that the representations made by appellants to induce them to relinquish the barge loading and to respect the picket line were in fact false (Tr. 414). Accordingly, about July 2, 1948, the members of I. W. A. voted to return to work and to claim the right to load the barges (Tr. 438, 441). This was not, as stated in appellants' brief, page 12, the first claim which I. W. A. made to the work. It was a reaffirmance of the original position of I. W. A. (Tr. 302, 303, 352, 349, 551, Pl. Exs. 8 and 9).

The mill reopened on July 19, 1948, with a small crew, but the picketing and other activities of appellants continued. Mr. Albright thereupon branded the sawmill

workers who had returned to work as strike breakers (Tr. 958-962, 780, 781, Plaintiff's Exs. 18 and 23). Germain Bulcke, vice president of appellant I. L. W. U., notified all Canadian locals of I. L. W. U. that Juneau Spruce products were unfair and this information was publicized in the official I. L. W. U. newspaper (Plaintiff's Ex. 24, Tr. 973-978). Longshoremen refused to load any of appellee's products on commercial steamers (Tr. 285, 294).

In August, 1948, a barge was loaded with lumber by the mill workers and departed for Prince Rupert. Threats were made that the barge would be followed (Tr. 763). Mr. Albright and a representative of Local 16 were in Prince Rupert when the barge arrived (Tr. 787, 788). The longshoremen in Prince Rupert refused to unload the barge, acting upon orders from John Berry, International representative of I. L. W. U. for British Columbia, who, in turn, was acting on orders from I. L. W. U. headquarters in San Francisco (Tr. 620-627). Appellee then succeeded in getting the barge unloaded at Tacoma, which was one of the few Pacific Coast ports not controlled by I. L. W. U. (Tr. 687, 274). But when appellee sent a second barge load of lumber to Tacoma in September, 1948, it discovered that even this port was closed to it. The barge remained in Tacoma and was not unloaded until during the course of the trial over six months later (Tr. 437, 438, 687).

As a result of its inability to market any of its lumber, appellee exhausted its storage space and was again forced to close the sawmill on October 11, 1948 (Tr. 696), and was still shut down at the time of trial.

In October or November, 1948, representatives of both appellants called on appellee, and stated that they wished to negotiate (Tr. 703, 730). The manager of appellee informed appellants that if they could agree with I. W. A. on some practical basis, he would recommend to appellee that it be accepted (Tr. 705). This proposal fell through because when appellants met with I. W. A. they increased their demands to include not only the actual barge loading, but also the sling men on the dock (Tr. 544-548).

At the time of trial, despite a ruling by the National Labor Relations Board that appellants were not entitled to the work in question (82 N.L.R.B. 650), the unlawful activities of appellants still continued. The members of Local 16 continued their picketing at appellee's plant (Tr. 411), and on May 2, 1949, while the trial was in progress, John Berry, acting on orders received from I. L. W. U. headquarters at San Francisco, again refused to permit lumber to be unloaded at Prince Rupert (Tr. 626).

The unlawful activities of appellants in seeking to force appellee to displace a small portion of its I. W. A.-represented employees for the benefit of appellants' members, caused damage to appellee in excess of $1,000,000 (Tr. 742, 759; Plaintiff's Ex. 14, 15). These figures did not take into consideration other items of substantial damage, such as loss of markets, decreased retail business, and deterioration in lumber and log stocks (Tr. 717, 718, 758).

I.

THE ONLY PREREQUISITE TO A CAUSE OF ACTION UNDER SECTION 303(b) IS THE COMMISSION OF THE ACTS CHARGED

Reduced to its essence appellants' contention in the corresponding section of their brief is that it would be awkward to have the National Labor Relations Board hearing a "jurisdictional dispute" under the National Labor Relations Act procedure while simultaneously a court was hearing an action for damages on the same facts and against the same union under Section 303 of the Labor-Management Relations Act, 1947. In such a situation, appellants reason, the Board might reach one result, the court another. Therefore, say appellants, a damage action for injury caused by a jurisdictional dispute cannot be heard by the courts until the Board has arbitrated the contentions of the union involved and has found adversely to it.

To reach the substance of appellants' misunderstanding of the Act, embodied in this contention, brevity will ultimately be served by a short statement of the structure of the Labor-Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136, 29 U.S.C.A. § 141 et seq., P. L. 101, 80 Cong., 1 Sess.).[1]

At the time of enactment of this statute the National Labor Relations Act, known as and hereinafter called

[1]Like appellants, appellee believes the most satisfactory reference to the history of the Labor-Management Relations Act, 1947, to be the two-volume "Legislative History of the Labor-Management Relations Act, 1947" published by the N.L.R.B. All references in this brief entitled "..... Leg. Hist....." will refer to this work.

the "Wagner Act", had been in effect some twelve years. It in substance guaranteed to labor the right to organize freely for collective bargaining purposes, and provided the machinery for the exercise of that right and punishment for its denial, all through an instrumentality of the United States with preferential access to the enforcement processes of the courts. That agency was the National Labor Relations Board, also referred to here as the "Board."

Conceiving that both the Wagner Act and its administration were fundamentally faulty, and that experience had demonstrated a need for elimination of certain practices, Congress extensively amended the Wagner Act, retaining in the amendment that Act's guarantees, machinery, and enforcement powers, and adding certain duties and restraints upon the exercise of such rights. The Wagner Act revision comprises Title I of the Labor-Management Relations Act, 1947, above cited and hereafter referred to as the "Act."

In thus legislating on labor affairs, Congress also added some new statute law, but instead of electing to proceed by separate bills, one for each subject, as was urged by some members of the Senate Committee on Labor and Public Welfare[2] it simply made under one bill separate titles of each of the new subjects.

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[2]From Senator Thomas' Separate Report on S. 1126 (1 Leg. Hist. 455):

"It would make better sense not to lump unrelated subjects into one omnibus bill . . .

"I believe the majority party acted unwisely in not following my suggestion of several bills for several subjects . . ."

Senator Morse on the floor (2 Leg. Hist. 1507):

"I deeply regret that the Senate did not see fit to proceed with labor legislation one issue at a time, by way of one title at a time; . . ."

Title II stated the Federal policy, and provided new Federal machinery, for peaceful settlement of the economic disputes which sometimes arises after the parties have reached the bargaining table and have there acted in good faith, all in compliance with the commands of the Wagner Act. Title III deals with practices in the general field of labor deemed injurious, wholly apart from organization and bargaining procedures, and prohibits them: government employees may not strike; certain payments may not be made to unions by employers; political contributions may not be made from union funds; and unions engaging in jurisdictional strikes and secondary boycotts, as defined in the Wagner Act, may be required to answer in damages to anyone injured thereby. And lastly, Title IV provided that a joint Congressional committee be created to study the problems of labor relations and productivity as a continuing inquiry into an ever-changing field. (Title V simply provides definitions for terms used in Titles II, III and IV, and the "separability clause.")

Of all the activities of organized labor which had caused concern, however, two were singled out by Congress for special attention: secondary boycotts and jurisdictional disputes. These attempts to settle interunion conflicts by economic force had aroused public resentment and judicial condemnation: denied the aid of both the Board and the courts[3] the public, employers, and employee hostages had stood helplessly by while such conflicts had mounted in numbers. Enforcement of

[3] *U. S. v. Hutcheson*, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 819; N.L.R.B. v. *Gluek Brewing Company*, 144 F. (2) 847.

union objectives by these means found no defenders at all in jurisdictional disputes; in secondary boycotts the only controversy also was delimiting the "bad" and "legitimate" objectives.[4]

Accordingly, in amending the Wagner Act Congress provided in Section 10, relating to enforcement of the rights and prohibitions of Section 8, that in addition to the normal enforcement of other unfair labor practices by the Board on behalf of the United States, the Board should give investigation of such charges preferential status over all others except similar charges,[5] and, if supported, required the Board to seek a restraining order to maintain the *status quo* pending a final Board order enforceable by an appropriate U. S. Court of Appeals.[5] Thus, in this class of cases, and this alone, the offending union would be required not only to defend its conduct before the Board, but could also be enjoined from pursuing its chosen course until a Court of Appeals made its order as a result of the Board's decision and the objections thereon voiced before it.

A union charged with provoking such a jurisdictional dispute was, however, afforded the opportunity of preliminary dismissal before the foregoing-described mandatory duties of the Board became operative. This class of activity was conceived of as being peculiarly susceptible to interunion machinery for settlement. So Sections 10(k) and (l) together provide that after an 8(b)(4)(D) charge is filed the offending union may procure dismissal

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[4]2 Leg. Hist. 1455 (Senator Murray): also excerpts from Presidential message on the State of the Union, Jan. 6, 1947, reprinted 1 Leg. Hist. 608.
[5]Sec. 10(1).

by settling its claim within ten days, or it may thereafter submit to and abide by an award of the Board. If, as here, the union charged will not settle its contentions by the machinery available for that purpose,[6] and does not abide by the Board's decision,[7] then the full power of the Board and the Federal judicial machinery is brought against it on behalf of the United States.

In addition to the duties of the Board in the enforcement of the public policy respecting jurisdictional disputes and secondary boycotts, these contests were also thought serious enough that in Title III of the Labor-Management Relations Act Congress provided that the union which engaged in them should answer to any person injured thereby to the extent of the damage caused. Like the Sherman Act and the Fair Labor Standards Act,[8] which create for their offenders the dual hazard of enforcement at the instance of the United States and damages to wipe out the private injury, this right was clearly regarded not only as recompense to the person damaged by such acts, but also as an additional discouragement against resorting to such means in the first place.[9]

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[6]Tr. p. 427.

[7]82 N.L.R.B. 650.

[8]Hereafter discussed in Subdivision IB, page 27 et seq., of this brief.

[9]Respecting the floor amendment providing for this private relief Senator Ives (N.Y.), a member of the Senate Committee on Labor and Public Welfare said (2 Leg. Hist. 1357):

> "I know of no reason in the world why one suffering from such abuses or violations should not have the right to recover damages, not only in the Federal Court but in any court.
>
> " . . . Once it is established that recovery may be had for damages in the Federal courts, it will go a long way toward stopping the jurisdictional dispute and secondary boycott."

Senator Taft, in charge of the bill, upon introduction of the floor amendment which is now Section 303 of Title III (with minor changes immaterial here) said (2 Leg. Hist. 1371):

This review of the legislative scheme for dealing with jurisdictional disputes will clarify appellee's more specific following points:

A. On the Same Facts the Board and the Courts Acting Independently Cannot Reach Materially Differing Results.

Appellants' contention is apparently founded on the misconception of the amended National Labor Relations Act that the Board in a "10(k) hearing" has the widest kind of discretion in awarding work tasks in jurisdictional disputes, including consideration not only of previous Board action but contracts, the tradition of the industry, etc. In fact, much of appellants' evidence was offered upon this mistaken theory. From this appellants reason that the Board has the right and duty to adjust the jurisdictional or "work" controversy on the merits, and that the practices of the accused union cannot be an offense until the Board has disposed of those merits and the union has failed to abide by the resulting award. Thus, it must then be contended, the aggrieved person cannot state a claim before the courts, whatever the language of Section 303(a)(4) until the Board has spoken, since it would be *the refusal to abide by the Board's decision,* not the commission of the acts interdicted by the statute, which would require the offender to answer in damages.

"It retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike. ". . . Further, I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes. . . . I do not think such suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent to prevent unions undertaking this kind of . . . activity."

The readiest answer to this conception of the statute is, of course, that this is not what Congress provided, and that if Congress had meant to so provide it would have been easy enough to have said so. To a contention similar to this, i.e., that though the statute did not so provide, an administrative determination should be held final because such was the logic of the Act, the United States Supreme Court returned the short answer that:

> "If Congress had deemed it necessary or even appropriate that the Administrator's orders should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so." *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 64 S. Ct. 474, 88 L. Ed. 635.

If Congress had intended that the action entitling an injured person to damages under Section 303(b) was not the commission of the acts described in Subsection (a)(4), but the failure of the defendants to abide by an award of the Board under a 10(k) hearing, Congress had ample words at its command to have described that intention. That it did not even hint at such an objective, but throughout used language which indicated clearly it did *not* so intend, is conclusive that appellants have not correctly read Section 303 of the statute.

Moreover, Congress knew precisely what it was doing when it expressly omitted the language appellants now say this Court must supply, for the bill's method of dealing with jurisdictional disputes did not escape observation and critical comment during its course after the floor amendment was offered which added Section 303 to the Senate Committee bill. For example, one of

the clearest expressions not only of what the bill means in this field, but of disproof that it provides what appellants say it must, came from Senator Morse, a member of the Senate Committee on Labor and Public Welfare and a generally recognized expert on Federal labor law. He said of the bill's method of dealing with jurisdictional disputes:

> "I do want to make the additional argument against the Taft substitute, that it makes it possible for *two different district courts and the N.L.R.B.* to be dealing *simultaneously* with the same subject matter. The Board would be conducting a hearing looking to a cease-and-desist order. At the same time the Board would be required, . . . to seek injunctive relief, which means that the (sic) would be two actions going on at the same time, or that there might be . . .
>
> "Finally, under this proposal, we have a third agency—probably a different Federal court—deciding whether a damage action lies. Such dispersion of authority, in my judgment, is very bad legislative policy." (Emphasis supplied) 2 Leg. Hist. 1358.

Notwithstanding this and similar objections the amendment was retained in the bill enacted by both Houses of Congress. Then, as one of his reasons for vetoing the measure the President's veto message of June 20, 1947, contained the following language in comment upon the bill's provisions for boycotts and jurisdictional strikes:

> "Moreover, since these cases would be taken directly into the courts, they necessarily would be settled by the judiciary before the National Labor Relations Board had a chance to decide the issue. This would thwart the entire purpose of the National

> Labor Relations Act in establishing the Board, which purpose was to confer on the Board, rather than the courts, the power to decide complex questions of fact in a special field requiring expert knowledge." 1 Leg. Hist. 920.

And while the record here discloses that the Board's "10(k) decision" did not follow, but preceded, the lower court's judgment, the vigorous challenges to other criticisms of the bill in the veto message did not gainsay the President's assertion of dual Board and court jurisdiction over "jurisdictional disputes" under the Act.

Thus the statute by its terms not only proves that appellants' construction is the precise opposite of the statute's meaning, but the history of the Act, and especially of the Section in question, clearly demonstrates that if appellants were correct in their construction, then every notion in Congress, critical and supporting, of the Act's construction was wrong. It seems apparent from this that appellants—and they alone—have misread the Congressional provisions dealing with jurisdictional disputes and their remedies.

In addition, however, appellants' position has other cogent defects as well.

While this court is not, and the court below was not, concerned with whether the actions of appellants were unfair labor practices under Section 8(b)(4)(D) of the National Labor Relations Act, but only whether they were " . . . unlawful, for the purposes of this section only, . . ." under Section 303 of the Labor-Management Relations Act, a short analysis of the treatment of jurisdictional disputes in the National Labor Relations Act

may serve to disclose how groundless is appellants' concept that the Board in a 10(k) hearing acts as a *bona fide* arbitrator of jurisdictional disputes in their technical aspects. For the fact is that while the *National Labor Relations Act* (not Title III of the Labor-Management Relations Act) in its inception provided that "jurisdictional disputes" should be subject to special handling *on the merits* (which would include interunion agreements over jurisdiction, "historical" or "traditional" assertions of the right to perform certain work, and the like), that concept was abandoned. As the Act was finally passed the inquiry is made by the statute a mere formality.

Originally the jurisdictional disputes provisions of the bill were the particular province of Senator Morse, a majority member of the Senate Committee on Labor and Public Welfare. His bill, S. 858,[10] made such disputes unfair labor practices, but described them as disputes over whether work was performed by employees who were or were not members of a particular labor organization.[11] Since the dispute described was a contest solely between two or more unions, as to which should or should not perform particular work and with-

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[10]2 Leg. Hist. 1001.

[11]Section 8(b)(2)(A) of S. 858 (Senate Committee Comparative Print, March 18, 1947, p. 9). The specific language is:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to engage, or to induce or encourage the employees of any employer to engage, in a strike or in a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, in the course of their employment (A) because particular work tasks of such employer or any other employer are *performed by employees who are or are not members of the particular labor organization*, . . ." (Emphasis supplied)

out reference to the employer's position, it was natural that the Senator insert in his bill a Section 10(k), which was identical[12] with the corresponding subsection as finally reported[13] (except that the descriptive subsection reference was of course changed). And with the offense so described, Senator Morse's "arbitration" method of dealing with an unresolved dispute was sensible, since the contest would be only between unions claiming certain work.

But though Section 10(k) remained as it had been in S. 858, the thing it was supposed to deal with was changed, not in conference as appellants suppose,[14] but by S. 1126, as reported.[15] There the *employer's assignment* was made the crux of the contest, but as between two or more unions still.[16] In this form the description of the dispute passed the Senate in H.R. 3020 and went to conference.[17]

Then the conferees made still another change in Section 8(b)(4)(D) still without changing Sec. 10(k), and thus removed the last real function for the Board under the latter section. As the bill came back from conference[18] and was enacted over a veto[19] it designated additionally employees in any trade, craft, or class to whom

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[12]Ibid., p. 16.

[13]1 Leg. Hist. 130.

[14]Appellants' brief, p. 46.

[15]1 Leg. Hist. 113.

[16]As reported to the Senate, and then as passed, Sec. 8(b)(4)(d) read " . . . for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless . . ."

[17]1 Leg. Hist. 291.

[18]1 Leg. Hist. 511.

[19]2 Leg. Hist. 1657.

work might be assigned by the employer.[20]

Thus, the demise of the Board's discretionary duty under Section 10(k) is complete with the change in theory and language of Section 8(b)(4)(D), from the "craft union" approach to the assignment of work principle without a corresponding change in Section 10(k). As the two now stand the Board's duty is not to *decide between union claims,* which may be on certification, interunion work-defining agreements, traditional jurisdiction, *et cetera,* for which a skilled arbitrator would be needed. Instead, the questions for decision are simply: (1) To whom had the employer assigned the work in issue? and (2) Is that assignment of work in contravention of a certification of the National Labor Relations Board under Section 9(c) of the National Labor Relations Act?

Brought down to the issue here, the statute as enacted required no different approach, no different test, no different inquiry by the Board, in assessing the 8(b)(4)(D) violation charged by appellee, than that of the lower court in determining the validity of appellee's cause of action under Section 303(a)(4) and (b). That appellee had assigned the work in question—the loading of appellee's barges—to members of its plant crew, all of whom were represented by Local M-271, I.W.A. (CIO), was never even questioned, either in the court

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[20]Though set out in appellants' brief, the pertinent language of the subsection is worth repeating here for comparative purposes with footnotes 11 and 16, *supra*:

". . . forcing or requiring any employer to assign particular work to employees in a particular labor organization or *in a particular trade, craft, or class* rather than to employees in another labor organization or in another *trade, craft, or class, unless* . . ." (Emphasis supplied)

below or before the Board in the "10(k)" proceeding. In the Board case it was found,[21] here it was stipulated,[22] that the appellee was not failing to conform to a certification of the National Labor Relations Board in making the aforesaid assignment, since there was no certification at all. Thus, while the Board has at least twice held[23]—though without review of the rulings' correctness by any court—that the legislative progress of Section 8(b)(4)(D) did not in effect delete Section 10(k), its decisions clearly disclose that its inquiry is purely fact-finding and ministerial in character, having nothing of the skilled interunion jurisdictional arbitration about it.

If the narrower, craft union approach to the problem had been retained intact from the Morse bill version of Section 8(b)(4)(D), there would have been not only logic, but necessity, in adding as a condition precedent to Section 303(b) that the Board first arbitrate the issues. However, the sections grew apart; the procedure stood still but the substance changed. And since the major change took place in the Committee bill, much before Section 303 was attached as a floor amendment, no condition was put in Section 303(b); it would serve no useful purpose, for the question of who is entitled to the work (absent a Board certification) is decided by the employer.

If appellants' reference to *Winslow Brothers,* 90 N.L.R.B. 188 (Br. 49), is intended to indicate to the

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[21]See 82 N.L.R.B.650.

[22]Tr. 1056.

[23]Moore Drydock Company, 81 N.L.R.B. 1108, and Juneau Spruce Corp., 82 N.L.R.B. 650, *supra.*

court that the National Labor Relations Board has in that case decided a jurisdictional dispute on the traditional "craft union" basis where there is an employer assignment involved, they clearly misread the case. The dispute there was between two existing bargaining units as to which contract included the work in question. Thus the matter there involved was one of two overlapping contracts, the employer uncertain and unwilling to risk assignment and the hostility of the losing union. No such question is here present.

Also, the two undesirable results appellants see in a construction contrary to theirs (Br. 49, 50) are of course wholly nonexistent where the test is that of the employer's assignment. Those results would follow, as appellants fear, only if the "craft union" approach to the objective of the controversy had been left in the statute, and Section 10(k) had been left out. Since neither of these events happened, appellants' fears are groundless.

B. The Doctrine of Primary Jurisdiction Does Not Support but Refutes Appellants' Position.

Appellants rightfully say in their brief[24] that the court below did not submit to the jury the issue whether or not the I.L.W.U. members were entitled to perform the work of loading appellee's barges, since it did not conceive this inquiry to be an issue in the case. In this concept of the law the trial court was clearly correct. As we have heretofore stated, the question is not, and has never been since the statute's enactment, who is "*entitled* to perform the work" in question; given the

[24]Appellants' brief, pp. 52-53.

employer's assignment and the lack of a Board certification, even the Board whose business enforcement of the National Labor Relations Act is, cannot now under the terms of Section 10(k) decide who is *entitled* to perform the work in issue after the manner of a craft union contest, the employer standing neutral.

Notwithstanding this erroneous basic concept of the Board's duty, appellants argue that there is a general doctrine of primary jurisdiction in the field of statutory construction, and rely principally upon the Interstate Commerce Act and *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*,[25] in support of the contention.

Because the doctrine adverted to does not run at large among all statutes emanating from Congress, the gist of appellants' argument must necessarily be that the powers of the Interstate Commerce Commission in rate-making, and the powers of the N.L.R.B. in jurisdictional dispute cases, are similar or identical, and that the objectives of the two acts are likewise similar or identical. Congressional creation of an administrative agency in a statute does not *ipso facto* mean it has the same powers as such agencies under other statutes.[26] For while the Interstate Commerce Act clearly clothes the Commission with the duty of determining the reasonableness of rates,[27] and thus obviously requires that prerequisite before a shipper can recover for an "unreason-

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[25]204 U.S. 426,27 S. Ct. 350, 51 L. Ed. 553.

[26]Compare the status of the Federal Trade Commission (*Federal Trade Comm. v. Gratz*, 253 U.S. 421, 40 S. Ct. 572, 64 L. Ed. 943) with that of I.C.C. (*Great Northern Ry. Co. v. Merchants' Elevator Co.*, cited *post*).

[27]*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 184, 33 S. Ct. 893, 57 L. Ed. 1446.

able" rate, other statutes make no such preliminary requirement of the Federal agency in whose domain their enforcement lies. Such are the Sherman and Clayton Acts and the Fair Labor Standards Act,[28] for example.

The unsuitability of the appellants' argument to the scheme of the statute now being considered is aptly noted in *Frey and Son v. Cudahy Packing Co.*, 232 F. 640 (1916). Plaintiff there sued for treble damages under the Sherman and Clayton Acts.[29] The opinion (U.S.D.C. Md.) is:

> "Defendant entered a demurrer to these counts of the declaration. It says that under the Clayton Act the courts have no jurisdiction of suits brought to recover for price discriminations, until after the Federal Trade Commission has determined that there was such discrimination. By analogy it relies upon the case of Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and the cases which have followed it.
>
> "It is unnecessary here to determine whether the law laid down in those decisions is or is not ever applicable to price discrimination forbidden by the Clayton Act. The facts alleged make a case analogous to that of Pennsylvania Railroad Company v. International Coal Company, 230 U.S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, in which it was held that the courts had jurisdiction to award damages for the discrimination therein set up, although the Interstate Commerce Commission had not acted or been asked to act.
>
> "The demurrer will be overruled."

As this Court has recently noted in *Reconstruction Finance Corp. v. Spokane, P. & S. Ry. Co.*, 170 F. (2)

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[28]Discussed post, pp. 27 to 29.
[28]Discussed post, pp. 27 to 29.

96,[30] the Interstate Commerce Act confers upon the Commission the power in all cases to determine all factors relating to reasonableness of rates. The footnote quotation used is so clear that it bears repetition here:

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and *calls for an exercise of the discretion of the administrative and rate-regulating body*. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals." *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U.S. 184, 185, 196, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. (Emphasis supplied)

But if the words of a tariff are used in their ordinary sense, or the question is one of fact concerning the identity of a commodity, the court may decide the issue.[31]

The Interstate Commerce Act and the cases under it not only do not support appellants' view, but confirm the contrary construction.

First, as above noted from footnote 3 in this Court's

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[30]See especially footnote 3, p. 98.

[31]Cf. *Great Northern Ry. Co. v. Merchants Elevator Co.,* 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943.

opinion in the *S. P. & S.* case, *supra,* the great objective of the Commission's power is to assure uniformity in rates on a nation-wide basis. Here, in jurisdictional disputes in the field of labor, the nation-wide uniformity is even in theory undesirable and in practice impossible, whether it be the early discretionary approach of the Morse bill or the employer assignment inquiry of the statute as enacted (though uniformity in the same dispute is provided by the ministerial findings).

Second, even under the Interstate Commerce Act the cases, of which *Great Northern Ry. Co. v. Merchants' Elevator Co.,* cited in footnote 31, *supra,* is an example, reject the doctrine that the complainant must in all cases first resort to the Commission for a decision.

And third, in the Interstate Commerce Act Congress left it wholly to the Commission to say what is a reasonable rate, which remains undiscoverable until the Commission acts, untrammelled by any mandate but the Constitution; here, with that example before it, Congress still provided that in jurisdictional disputes the Board should have no duty but factual inquiry, which any tribunal could make and no two reasonably make differently.

Thus the appellants' example establishes contrast, not similarity.

But though the Interstate Commerce Act and the cases under it do not establish, but deny, similarity with the instant question, there are statutes similar in stated Congressional policy; the Sherman and Clayton Acts[32]

[32] 15 U.S.C.A. §§ 1-7, 15; 15 U.S.C.A. § 12 et seq.

and the Fair Labor Standards Act[33] are the examples coming most readily to mind. In each case the statute sets forth a national policy, respectively prohibiting combinations which restrain trade and overlong hours or sweatshop wages, with enforcement in Federal agencies. And in addition each gives the private person injured by the prohibited activity a cause of action against the wrongdoer,[34] which in neither case depends upon the action of the Federal enforcement agency to perfect.[35]

And while in the case of the Sherman and Clayton Acts the Department of Justice or Federal Trade Commission may seek to enforce against a defendant one conception of the result of his acts, and the person suffering injury another, or in the case of the Fair Labor Standards Act the Administrator may seek through a court to enforce compliance by the defendant independent of the injured employee's damage action and even at variance with it, in either case there need not be two final, nonappealable and conflicting orders or decisions binding the same defendant for the same acts, since the defendant may have review of both the publicly and privately-brought proceedings.[36] So here, though a union may be charged before the Board with a "public wrong" by the United States, and sued in a court for private damages, where it engages in a jurisdictional dispute, it can "appeal" from the Board's order by resisting its en-

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[33]29 U.S.C.A. § 201 et seq.

[34]Sherman Act: 15 U.S.C.A. § 15; Fair Labor Standards Act: 29 U.S.C.A. § 216(b).

[35]Sherman and Clayton Acts: *Frey & Son, Inc. v. Cudahy Packing Co., supra,* 232 F. 640; Fair Labor Standards Act; *Colan v. Wecksler,* 45 F. Supp. 508.

[36]*Federal Trade Comm. v. Gratz, supra; U. S. v. Darby Lumber Co.,* 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609; also 28 U.S.C. § 1291 and § 1254.

forcement[37] or actually appeal.[38] And it will also have the right to appeal the court's damage judgment. And, as in this case, both rights of appeal are to the same court.

Thus the scheme of the Labor-Management Relations Act is precisely the same—in the field of boycotts and jurisdictional disputes—as is the Sherman and Clayton Acts or the Fair Labor Standards Act; commission of the same prohibited activity may at once make the transgressor liable to answer to the United States for a "public wrong," and to the private person injured thereby for his damages. And there is no more cause to say that the damage action here must wait until the United States, through the Board, has acted than to say that the laborer denied his statutory wages must wait on the Administrator before he may recover his pay, or that the victim of a conspiracy to restrain trade must await the conclusion of the Department of Justice or the Federal Trade Commission ere he sues to recover the treble damages to which he is entitled. The scheme of all three statutes in this respect is the same.[39]

For any one, or all, of the foregoing reasons it appears clear that the appellants have read, not what the statute provided with respect to the administrative functions of the N.L.R.B. in jurisdictional dispute cases, but what the early drafts of the legislation in question would have provided if left unchanged. And because of this basic fallacy—that the Board is given an almost limitless latitude to decide which of two or more contesting

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[37]National Labor Relations Act, Sec. 10(e).

[38]National Labor Relations Act, Sec. 10(f).

[39]See, for example, Senator Taft's parallel between this section of the Act and the Sherman Act (2 Leg. Hist. 1398).

unions is entitled to perform work tasks with the employer standing indifferent—appellants' whole view of the statute must fall.

II.

THE COURT BELOW HAD JURISDICTION OF THE PARTIES AND OF THE SUBJECT MATTER OF THE ACTION AND WAS RIGHT IN ITS RULINGS

The court below, in a carefully considered opinion (83 F. Supp. 224) ruled that it was a "district court of the United States" within the meaning of Section 303(b) of the Labor-Management Relations Act, which reads as follows:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

This ruling appellants assign as error.

We think it virtually impossible for the court to have reached any other conclusion. To have held, as appellants urged, and here urge, that the Alaska court was not a "district court of the United States" within the meaning of that section of the Act, would have been to discard every expression of Congressional intent in the Act itself and to elevate one—and minor—rule of statutory construction above every other.

Not only was the Alaska court right in holding that it was a "district court of the United States," but as it was "any other court having jurisdiction of the parties," its rulings were correct.

At the outset of this discussion we think it should be noted that appellants, possibly without intent to do so, have done a disservice to a clear analysis of the meaning of the phrase "district court of the United States" in the entire Point II of their brief, by the uniform use of capital letters in the words "district court." The statute under consideration nowhere specified "District Courts of the United States" nor does the statute creating the Alaska court, whether in its original or amended form, capitalize those words. Lastly, the lower court in its opinion above referred to did not hold that it was a "District Court of the United States," but that it was a "district court of the United States" within the meaning of the Act because it was vested with the jurisdiction of a "district court of the United States" (83 F. Supp. 225, 227).

Obviously the decision of this court would not turn on the capitalization or lack of it, of the words "district court." But the constant misquotation of the phrase, even in a footnote which purports to be a direct quotation taken from the Act, indicates that perhaps there is a distinction between a "district court of the United States" and "District Court of the United States," in which the capitalized language would signify the "Article III" or Constitutional type of court, whereas the phrase with the first two words in lower case might indicate

Federal courts in general, including legislative courts. If there is any implied distinction in the use of capital letters in the phrase in question, it should be pointed out that the lower case for "district court" is used throughout the Act and that the direct quotation on page 72, footnote 37 of appellants' brief is, for that reason, not accurate.

A. The Alaska Court Is a District Court of the United States Within the Meaning of the Act.

1. The references to the Federal courts throughout the Act, and the applicable judicial decisions, establish that the designations of the courts were not words of art, but descriptions of all courts created by Congress.

Appellants argue that when Congress used the words "district court of the United States" in Section 303(b) of the Act, it was using them in the technical sense of "Article III" or "Constitutional courts," and not "Legislative courts" authorized by Article IV of that document. The only inquiry here is which meaning fits the evident purpose of the Act. *People of Puerto Rico v. Shell Co.,* 302 U.S. 253, 58 S. Ct. 167, 82 L. Ed. 235; *Atlantic Cleaners and Dyers v. United States,* 286 U.S. 427, 52 S. Ct. 607, 76 L. Ed. 1204.

The Labor-Management Relations Act containing the language in question was enacted June 23, 1947. At that time the status and jurisdiction of the Alaska court had long been specified by Congress as follows:[40]

[40]Act of June 6, 1900, 31 Stat. 322 as amended. Section 9 of the Act of June 25, 1948, 48 U.S.C.A. § 101 changed the word "Territory" to "District" but otherwise retained the quotation intact.

> "There is established a district court for the Territory of Alaska, *with the jurisdiction of district courts of the United States* and with general jurisdiction in civil, criminal, equity and admiralty causes; . . ." (Emphasis supplied)

Because the language of the statute above quoted vests the Alaska court with the "jurisdiction of district courts of the United States," it would seem that when Congress used the words "district court of the United States" in a statute, that phrase would automatically include the Alaska court's jurisdiction, since Congress is deemed to legislate with knowledge of the terms and effect of its own statutes. 50 Am. Jr. 331, "Statutes," § 339; *The Penza,* 9 F. (2) 527, 528; *Continental Ins. Co. v. Simpson,* 8 F. (2) 439, 442.

The conclusion seems inescapable that when Congress said that the Alaska court was to have "the jurisdiction of district courts of the United States" it meant exactly what it said, even though that court is not technically a Constitutional, but a Legislative, court created under Article IV of the Constitution. Certainly, if Congress can confer on an "Article III court" additional administrative functions (*O'Donoghue v. United States,* 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356), it can clothe an "Article IV" court, over which its power is plenary, with the jurisdiction of Article III courts. The principle here is no different than that in which Congress may act under its Article I powers in the Constitution to make of District of Columbia residents "citizens of a state" for diversity purposes in Constitutional or Article III courts. *National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 69 S. Ct. 1173, 93 L. Ed. 1556.

If appellants are right here, of course, every use of the words "district court of the United States" in the Act designates, in the technical sense, a Constitutional court, and where a particular court created by Congress does not fall within this designation, it has no jurisdiction under the Labor-Management Relations Act.

Reading the Act as a whole, and examining the varying references to the Federal courts used therein, allows no other conclusion to be reached but that while, as this Court has recently said in *Printing Specialties, etc. Union v. LeBaron,* 171 F. (2) 331, ". . . the statute is by no means a model of draftsmanship, . . ." it is plain that Congress intended in its varying references to Federal courts not to use those references narrowly, but as descriptions of any courts which Congress had power to, and did, create.

Proof that Congress did not use its designation of courts in the technical sense is afforded by the varying designations employed throughout the Act.

Including the Section here in question, the phrase *"district court of the United States"* is used six times in the Act. (Sections 10(b), 208(a), 301(a), 301 (b) and 301(c)).

"district court of the United States (including the District Court of the United States for the District of Columbia)" is the court designated three times. (Sections 10(e), 10(j) and 10(l)).

An equal number of times Congress employed the words *"courts of the United States."* (Sections 11(4), 301(b), and 301(d)).

Once (Section 11(2)) Congress used an all-inclusive description: *"district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia."*

Lastly, in Section 302(e) Congress used all the above description except one: *"district courts of the United States and the United States courts of the Territories and possessions."*

The very fact that there are these five different designations for the Federal courts, though the Act is applied uniformly in the States, the District of Columbia, and the territories, should be enough of itself to disprove any semblance of validity in appellants' contention. But additional evidence arises in considering the effect of these variations if appellants' theory is correct.

The first notable feature of the foregoing list is the status of the District of Columbia court. Congress was obviously using the words "district court of the United States" in a nontechnical sense, for if it were not the words "District Court of the United States for the District of Columbia" would not have been added to "district court of the United States" at any place, since that court has been held to be a Constitutional or Article III court. *O'Donoghue v. U. S.*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356.

Further, and more interestingly, however, if appellants are right in making the maxim *expressio unius est exclusio alterius* the only rule of statutory construction to be applied here, then quaere if that court had

power to issue its injunctions in the mine and railroad strike cases (*U. S. v. United Mine Workers,* 77 F. Supp. 563, aff'd 177 F. (2) 29, cert. den. 338 U.S. 871, 70 Sup. Ct. 140, 94 L. Ed. 71; *U. S. v. B. of L. E.,* 79 F. Supp. 485, cert. den. 335 U.S. 867, 69 Sup. Ct. 137, 93 L. Ed. 412). For while other sections of this Act add "District Court of the United States for the District of Columbia" to the phrase here in question, Section 208(a) confers injunctive jurisdiction in national emergency strikes only on "district courts of the United States," and does not add the name of the District of Columbia court.

Moreover, the title "district courts of the United States and the United States courts of the Territories and possessions," is found in Section 302, Title III, which prohibits any payments by employers to employee representatives except in a very limited class of cases. By the definition of "commerce" and "industry affecting commerce" in Sections 2(a) and 501(3) it is clear this interdiction applies to such payments when made in the States, the District of Columbia, and the territories, but not in the possessions. In fact, the Act has no application whatever to employees employed in an industry affecting commerce in the possessions.

Yet if the Act is construed as appellants say it should be, the power to enjoin such payments, provided for in subsection (e), *is not* given to the district court of the District of Columbia, in which the prohibition applies, but *is* given to the courts in the *possessions,* in which the Act has no application! Laying to one side the inquiry whether there is such a thing as a "district court" in a "possession" of the United States, it is clear beyond

cavil that this, as all other references to the Federal courts, was not employed in the technical sense or as a word of art.

The same situation with respect to the possessions is found in the description of the courts contained in Section 11(2), for here once again the "district courts" of the "possessions" are described, although the Act has no application in those areas.

A more anomalous situation yet arises when considering the language used in Section 301. It should be noted that if appellants are correct that "district courts of the United States" means "Article III courts," only, then under Section 301 (b) a money judgment collected in a district court in the 48 states would be enforceable only from union funds, while a money judgment collected in a territorial court could be collected not only from union funds but from the private assets of the members.

This consideration affords almost conclusive proof that the reference to courts was used solely to denote all federal courts, without any distinction between the federal courts in the States and those in the territories.

There is no question but that the reach of the entire Act is not only to the continental United States, but as well to the territories and District of Columbia. There is nothing anywhere in the Act suggesting that its rights and duties do not apply to employees, labor organizations, and employers in commerce, or affecting commerce, wherever located within those limits. In this respect the entire Act is no broader or narrower than, but

is identical with, the National Labor Relations Act or "Wagner Act" as constituted prior to June 23, 1947. And the application of that Act to the territories, including the Territory of Alaska, was never successfully questioned. *N. L. R. B. v. Gonzales Padin Co.,* 161 F. (2) 353; *Alaska Salmon Industry, Inc.,* 33 N.L.R.B. 727; *Alaska Juneau Gold Mining Co.,* 2 N.L.R.B. 125. Cf. Footnote 15, *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 69 S. Ct. 140, 93 L. Ed. 76.

It is also significant that not only is the Act utterly silent that there is any distinction between the District of Columbia, the 48 States, and the territories in the enforcement of public and private rights and duties under it, but no word in any of the reports or debates on the Act in either House even hints at such an intention. It is clear that no distinction was intended. Certainly, if it had been thought that the status of the court in the District of Columbia, for example, should even be cast into question in its power to enjoin strikes and lockouts which imperiled the national welfare under Section 208(a),[41] there would have been some word in the legislative history indicating such a doubt. The "national emergency strike" issue was much in the minds of the lawmakers at the time this Act was in the process of passage, for *United States v. United Mine Workers of America,* 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884, had been decided March 6, 1947, during the Act's progress through Congress. That the words "district court of the United States" should have been intended in the narrow

[41]In addition to the theory of appellants, *Page v. Burnstine,* 102 U.S. 664, 26 L. Ed. 268, throws that court's status in doubt when considered with *O'Donoghue v. U. S.*, cited *post.*

sense, or that the varying descriptions of the courts used in the Act should have significance, much less decisiveness, is to strain statutory construction far past the breaking point.

Nor, it should be added, is inexact language in court designations confined to the Labor-Management Relations Act. The cases cited in part 3 of this subdivision[42] deal with just such matters as this. But, in addition, carelessness in the title of the lower court from which this appeal is taken is found in the new Judicial Code (Act of June 25, 1948), which presumably is far more carefully drafted with respect to the title of courts than is a general statute which described courts only in connection with its enforcement.

Appellants come here, their jurisdictional statement says,[43] by virtue of 28 U.S.C., Sections 1291 and 1294(2), both of which describe the court appealed from as

> ". . . the District Court for the Territory of Alaska . . . ."

Yet in Section 9[44] of that same Act of June 25, 1948,[45] which placed the new Code in effect, Section 101, first paragraph of 48 U.S.C., states:

> "There is hereby established a district court for the District of Alaska, . . ."

And see 28 U.S.C., Sections 373, 460, 660, 753, 963.[46]

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[42]Post, pp. 45 to 49.

[43]Appellants' brief, p. 3.

[44]1950 Revised Edition, "Miscellaneous Provisions," p. 320.

[45]In effect when the suit below was commenced.

[46]This fact is an indication that the Revisers Notes, and the new Code itself, fail to afford support for appellants' theory.

And an examination of the cases shows that there is some lack of judicial unanimity in the proper description of the Alaska court.[47]

2. Whether a Constitutional or Legislative court is intended depends on the type of statute being considered and the subject of the inquiry.

Appellants also imply that the phrase "district court of the United States" has never been otherwise construed than in the restrictive sense of a Constitutional court. This is of course not true. As appellants state, *McAllister v. United States,* 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693; *Mookini v. United States,* 303 U.S. 201, 58 S. Ct. 543, 82 L. Ed. 748; and *I. L. W. U. v. Wirtz,* 170 F. (2) 183, hold that as used in the context there considered, "district courts of the United States" has this restricted meaning. But the same phrase has been said in other cases to have the opposite meaning, denoting non-Constitutional, or Legislative, courts. Thus Congress should be said to know, in using the words in question, *not* that they have only one meaning, but that they refer to *either* Constitutional or Legislative courts as the context of the statute may indicate.

Ever since the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter,* 1 Peters 511, 7 L. Ed. 242, which makes the distinction so clearly, the courts have, when occasion required, pointed out the difference between "Constitutional courts" created by Article III

[47]See for example *Aitchison v. Anderson,* 183 F. (2d) 922, 923, paragraph 1, and *Electrical Research Products Co. v. Gross,* 86 F. (2d) 925, paragraphs 1 & 2, both appeals from the Alaska court to this Court.

of the Constitution, and "Legislative courts" authorized by Article IV.

The distinction so made is vital to certain types of inquiries, such as that involved in *O'Donoghue v. United States,* 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356. There the issue was whether a judge of the Supreme Court of the District of Columbia was one of the judges "whose compensation may not, under the Constitution, be diminished during their continuance in office . . ." within the meaning of the Legislative Appropriation Act of 1932 (Ch. 314, 47 Stat. 382, 401). Congress had reduced the salaries of all judges it constitutionally could, and left it to the Supreme Court to decide in individual cases whether a given court was a Constitutional or Legislative court. In such case the Constitutional distinction between Article III, or Constitutional courts, and Article IV, or Legislative courts, was the entire burden of the inquiry. There are many other such cases, where the distinction is vital to, and the only point of, the inquiry before the court because it inheres in the subject matter or point being considered. Cf. *McAllister v. U. S.,* 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693, *supra.*

The second class of cases in which the distinction is necessary is where it clearly appears that the Congress in enacting the statute intended the language in question to apply to "courts of the United States" as created under Article III, even though a constitutional question was not involved. This is probably the more numerous class of cases, and is best illustrated by *I. L. W. U. v. Wirtz,* 170 F. (2) 183. This case involved the question whether the Norris-LaGuardia Act (29 U.S.C.A. § 101

et seq.) inhibited the injunctive jurisdiction of the circuit courts of the Territory of Hawaii under the reach of Section 13(d) of that Act. From the legislative history referred to in the opinion it is abundantly clear that the provisions of that Act were intended for and expressly limited to courts created by Congress under Article III, Section 1 of the Constitution. Thus, there not the words, but the legislative history of the Act, showed clearly that the strict or technical meaning of the words inhered in the Act construed.

The third group of cases involve statutes where it is obvious from the words used, the scheme of the Act, and its legislative history, that the foregoing distinctions are not material and that the phrase in question in the Act was not one of art but only of description of a class. Such is the Federal Trade Commission Act, in which the phrase was interpreted broadly, without reliance on the constitutional distinction but solely on broad rules of statutory construction and Congressional intent in the *Klesner* case, cited *post*. So also was the Maritime Requisitioning Act (Act of June 6, 1941, 55 Stat. 242) as amended by the Act of March 24, 1943, 54 Stat. 45, in which claimants for requisitioned vessels in the custody of the "United States district court" were allowed to bring suit therein. In *The Maret,* 145 F. (2) 431, the District Court of the Virgin Islands was held to be a "United States district court' within the meaning of the above Act, though "that court is not, speaking strictly, a 'United States district court' " (page 436, note 28). So also was Section 858 of the Revised Statutes of the United States relating to the competency of wit-

nesses, under which in *Page v. Burnstine,* 102 U.S. 664, 26 L. Ed. 268, the court construed the phrase not as one of art, but of description, and found the District of Columbia courts to be courts of the United States for this purpose. Of this case the Supreme Court in the *McAllister* case, *supra,* said (11 S. Ct. 949 at 953):

> "And there is nothing in conflict with this view in Page v. Burnstine, 102 U.S. 664, where it was held that Section 858 of the Revised Statutes of the United States, relating to the competency as witnesses of parties to actions by or against executors, administrators, or guardians, applied to the courts of the District of Columbia as fully as to the circuits and districts of the United States. That conclusion was reached, not because the courts of the District of Columbia were adjudged to be of the class in which the judicial power of the United States was vested by the Constitution, but because all the acts relating to the competency of witnesses, when construed together, indicated that that section of the Revised Statutes applied to the courts of the District of Columbia."

3. The statute clearly uses "district court of the United States" to mean any court created by Congress.

From what has heretofore been said it appears inescapable that:

(1) The entire Act, in its rights, machinery, and penalties, is applicable to employees, their representatives, and employers in an industry or activity in or affecting commerce as defined in Sections 2(6) and 501(3), which includes the territories and the District of Columbia as well as the States of the United States;

(2) The Federal courts, the judicial system in which the Act's rights, machinery, and penalties find enforcement, are described five different ways in the Act, viz:

"courts of the United States"
"district court of the United States"
"district court of the United States (including the District Court of the United States for the District of Columbia)"
"district court of the United States and the United States courts of the Territories and possessions"
"district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia;"

(3) There is no indication in the language of the Act itself, either expressly or by implication, that the untoward results which would flow from a strict construction of these varying designations are contained in the Act's scheme, but rather, every indication is to the contrary; and

(4) There is every indication in the legislative history of the Act, negatively by the complete lack of any statement in the committee reports, debates, and analyses of both opponents and proponents, and affirmatively by the statements that the power conferred was being given to "the Federal courts,"[48] that the courts referred to were those created by Congress under any of its Constitutional court-creating powers and synonymous with the scope of the Act.

Certainly also, the distinction between Constitutional courts under Article III, and Legislative courts under

[48]See footnote 9, p. 14, *supra*. See also 2 Leg. Hist. pp. 1357, 1371-3.

Article IV does not inhere in the subject matter of this Act or the action under it, as in *O'Donoghue v. U. S.*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356, or *McAllister v. U. S.*, 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693. And there is nothing in the Act or its legislative history to indicate that it was intended to apply only to Constitutional courts, as in the Norris-LaGuardia Act.[49]

The designation of the Federal courts used in this act does not bring the case within either the first or second class of cases referred to in the immediately preceding subdivision of this brief. But the variation in words used to designate the courts on which power is conferred, the scheme of the Act, and its legislative history, all bring it squarely within the class of cases in which the courts have held that the designation of a court in a statute was not one of art, but only descriptive of a class.

In this class of cases come *The Maret,* 145 F. (2) 431, 437, and *Page v. Burnstine,* 102 U.S. 664, both cited *supra.* But there are many others as well, some of which are relied on by appellants in support of their contention, which are further authority for the appellee's assertion that when the intent of Congress is found to be fulfilled by a broad, and not a restrictive, use of the language employed to designate a court, that usage will be given.

The case identical in principle to the case at bar, and decisive in rejecting appellants' theory, is *Federal Trade Commission v. Klesner,* 274 U.S. 145, 47 S. Ct.

[49]The distinction between the legislative history of this Act in this respect, and the legislative history of the Norris-LaGuardia Act on the same issue, quoted by this Court in *I. L. W. U. v. Wirtz,* 170 F. (2d) 183, is of considerable significance.

557, 71 L. Ed. 972. That case involved a "cease-and-desist" order of the Federal Trade Commission, which forbade Klesner from continuing certain practices in the District of Columbia found to constitute unfair competition. He disregarded the order, whereupon the Commission sought its enforcement in the Court of Appeals of the District of Columbia under Section 5 of the Act, which provided that in such cases

> ". . . the Commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person . . . resides or carries on business, for the enforcement of its order . . . ."

Klesner urged, and the District Appellate Court held, that the Commission's petition should be dismissed because the Court of Appeals for the District of Columbia was not a "Circuit Court of Appeals of the United States."

The Supreme Court reversed, holding that while the Appellate Court for the District of Columbia was not technically a "Circuit Court of Appeals of the United States," it was the evident intent of Congress to provide that the Federal courts holding the first appellate jurisdiction over the Federal trial courts should have power to enforce the Commission's orders, and that the District of Columbia appellate court met that description. The court defined its problem thus:

> "The question, therefore, which we have to answer, is whether, when Congress gave the Commission power to make orders in the District of Columbia, with the aid of the Supreme Court of the

> District, in compelling the production of evidence by contempt or mandamus, it intended to leave the orders thus made, if defied, without any review or sanction by a reviewing court, though such review and sanction are expressly provided everywhere throughout the United States except in the District. We think this most unlikely, and therefore it is our duty, if possible in reason, to find in the Trade Commission Act ground for inference that Congress intended to refer to and treat the Court of Appeals of the District as one of Circuit Courts of Appeals referred to in the Act to review and enforce such orders."

The court then referred at length to *Steamer Coquitlam v. United States,* 163 U.S. 346, 16 S. Ct. 1117, 41 L. Ed. 184, and quoted from the opinion in that case the following language:

> " 'Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—*by whatever name those courts were designated in legislative enactments*—should be reviewed by the proper Circuit Court of Appeals, leaving to this court the assignment of the respective territories among the existing circuits.' " (Italics supplied by appellee).

Immediately thereafter the court in the Klesner case said:

> "We think we may use the same liberality of construction in this case."

Noting that the District of Columbia appellate court exercised ". . . exactly the same function as the Circuit Court of Appeals does . . ." with respect to the District trial court, the court continued:

> "We must conclude that Congress, in making its provision for the use of the Circuit Courts of Appeal in reviewing the Commission's orders, intended to include within that description the Court of Appeals of the District of Columbia as the appellate tribunal to be charged with the same duty in the District."

Then the court concluded with this significant statement:

> *"The law was to be enforced, and presumably with the same effectiveness, in the District of Columbia as elsewhere in the United States."* (Emphasis supplied)

The principles of the *Klesner* decision are squarely in point here. As has been previously noted,[50] the cause of action provided in Section 303 for the activities there described as unlawful is not only to make whole the injured person but, equally or even more importantly, is a part of the enforcement procedure of the Labor-Management Relations Act, 1947. And it is obvious that this hazard to the commencement of such specially-described conduct was to be equally applicable wherever it was made unlawful by the Act.

The instant case is even stronger than the *Klesner* case for here, unlike the Act there, the many different designations of the Federal trial courts, instead of one, would not allow a statement such as was made by Mr. Justice McReynolds in his lone dissent that the designation of the court was "deliberately chosen."

Since the *Klesner* case cited the relevant language in support of this same point from the *Steamer Coquitlam*

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[50]Footnote 9, *supra*.

v. United States, supra, we will not elaborate on the relevancy of that case also to the matter at bar.

The cases considering the status of the Hawaii court, rather than supporting appellants' position, quite clearly disprove it.

In the *Wirtz* case (*I. L. W. U. v. Wirtz,* 170 F. (2) 183) this Court, speaking through Judge Denman, adverted throughout the opinion to the legislative history of the Norris-LaGuardia Act (29 U.S.C.A. § 101), which disclosed beyond doubt that that Act was not intended to encompass or inhibit any Constitutional or "Article III" courts in its scope. The legislative history of the Act now before the Court is completely contrasting, however, for there is no word whatever to indicate that Congress had a similar intent to that so carefully and clearly pointed out in the *Wirtz* case. All of the evidence of that intent is that the courts named, by whatever designation used, were to be those where the Act was applicable, which includes alike the territories, the District of Columbia, and the 48 States. Thus the *Wirtz* case compels the conclusion that when the legislative intent is *contra* to the one there found, then the Act is applicable to "district courts of the United States" in a territory.

Additionally, Judge Wirtz was, as Judge Denman pointed out, a judge of the circuit court of Hawaii, which is a territorially-created, and not a Congress-created, court.

Neither is *Mookini v. United States,* 303 U.S. 201, 58 S. Ct. 543, 82 L. Ed. 748, in point here. There the stat-

ute under which the Supreme Court promulgated its Criminal Appeals Rules specified the "district courts of the United States, including the district courts of Alaska, Hawaii, . . ." etc. When the Rules were first promulgated the Supreme Court carved out only "district courts of the United States," and omitted the other courts, in which the Rules were to apply. In construing its own intention, not that of Congress, it naturally followed that the Supreme Court should hold that when it selected one court of several named, it intended to exclude the others. How any other result could have been reached by the court can not be imagined; the Supreme Court could make its rules applicable to any or all of the courts named by Congress where its power could be exercised, but selected only one. But the case is no indication that "district courts of the United States," as used in this Act, should not mean the district court for the District of Alaska, which is specifically given by Congress

> "the jurisdiction of district courts of the United States"

when the legislative history and the language of the Act both indicate it was intended to apply to all its courts.

Nor does the confinement of the Federal Rules of Civil Procedure to the district courts in the States, until subsequent Acts make them applicable to the Federal courts in the Territories of Hawaii, Puerto Rico and Alaska, indicate any principle supporting appellants' position on the instant statute. Instead, the applicability feature of these rules affirms the position of appellee. For nothing either in the Act authorizing the promulga-

tion by the Supreme Court of Federal rules of civil procedure or its legislative history indicates any intent that the Act was to be applicable to the Federal courts in the territories. On the contrary, such evidence as there is in that history and language indicates the Congressional intent to confine the territorial scope of those Rules to the Federal courts in the 48 States; the subsequent legislation extending them to Hawaii and Puerto Rico, and later to Alaska, are simply confirmation of that intent. Thus the question of applicability of the Federal Rules of Civil Procedure invokes the same principle adopted by this Court in the *Wirtz* case, *supra,* i.e., that it is clear that the Congress intended to restrict the applicability of the Act in question to the more limited class of Federal courts sitting only in the States and called "Constitutional courts," as was the case in the Norris-LaGuardia Act.

Thus there is no magic in the words "district court of the United States". Nowhere in the cases have the courts considered the phrase in a vacuum, as appellants would have this Court do here. Everywhere throughout the cases the courts considered the designation of courts used by Congress as the context and legislative history of the Act intended. Where it is clear from the subject matter or the legislative history that Constitutional or Article III courts are intended by Congress, the courts so hold; when that context and legislative intent indicate that it was not so intended, the courts so hold. Thus the only question here is the meaning of the phrase as used in this Act, and for the foregoing reasons there is no support whatever for the contention of appellants.

Instead it is clear that Congress used, and intended to use, the phrase to designate those courts created by the Congress in any place in which the Act applied.

B. The Rulings of the Alaska Court Were Right if its Status Was Otherwise Than a "District Court of the United States" Within the Meaning of the Act.

Appellants say that because it misconceived its status, which was that of "any other court having jurisdiction of the parties" in Section 303(b), and not a "district court of the United States" within the meaning of the Act, the rulings of the court below were wrong in three respects: (1) as to jurisdiction; (2) as to service; and (3) as to the law of agency.

While it seems clear that the point is not material here since the court below was a "district court of the United States" within the meaning of the Act, the contentions made by appellants in this respect are likewise unfounded, for the rulings of the court below were proper either under the Act or independent of it.

1. As to jurisdiction.

Except for appellants' reference to the unreported case of *Burris v. Veterans Alaska Cooperative Co.,* concerning which appellee will comment later under this point, we do not understand appellants to use the word "jurisdiction" to mean that the Alaska court would have no right to hear and decide any case in which an unincorporated association was a party. And it would be

useless to labor the point since the court below is a federal court having *"the jurisdiction of district courts of the United States"*[51] and at least since 1922[52] the law in the federal courts has been that a partnership or other unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.[53]

Thus, since the right being enforced against appellants is a right defined under the laws of the United States, i.e., under Section 303 of the Act, appellants as unincorporated associations could have been sued as entities by appellee in the Alaska court wholly aside from "the limitations and provisions of section 301" respecting suits against appellants as entities.

We are sure appellants' reference to the unreported case of *Burris v. Veterans Alaska Cooperative Co.* at page 76 of their brief, is not intended to imply that in the district court for the District of Alaska an unincorporated association cannot sue or be sued as an entity when the object of the suit is to enforce a right existing under the Constitution or laws of the United States. But even as to a suit on a nonfederal right, a matter not here involved, appellants have not correctly stated the decision of the Alaska court. Since one of counsel for appellants was also counsel in that case, as the memo-

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[51]A status it has occupied since the Organic Act of 1884. See footnote 40, *supra.*

[52]*U. M. W. v. Coronado Coal Co.*, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975.

[53]*Williams v. U. M. W.*, 294 Ky. 520, 172 S.W. (2) 202, 149 A.L.R. 505; *Christian v. I. A. M.*, 7 F. (2) 481; *Thermoid Co. v. United Rubber Workers of America*, 70 F. Supp. 228, 233; Cf. *Electrical Research Products Co. v. Gross*, 86 F. (2) 925, 926.

randum decision and order reveals, we cannot understand how appellants' counsel could misread the opinion of the lower court. As its text, printed in full in the appendix of this brief reveals, it did not hold that a suit against an unincorporated association cannot be maintained in Alaska, but simply that in that case the plaintiff had not stated a cause of action against persons captioned there as members of such an association.

But even if counsel had read and stated the decision correctly it would have no pertinency here, since no right conferred by federal statute, which lets unincorporated associations sue or be sued as entities in federal courts, was there involved. Thus appellants' assumption that the suit against them as entities was dependent on the court's status as a "district court of the United States" as meant in the Act, and not as "any other court having jurisdiction of the parties," is wholly unfounded. Not only may a union sue or be sued as an entity in a federal court in the enforcement of a federal right (*United Mine Workers v. Coronado Coal Co.,* 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975), but where such a right is involved it may also sue or be sued as an entity in the state courts. *Williams v. United Mine Workers,* 294 Ky. 520, 172 S.W. (2) 202, 149 A.L.R. 505.

The cases cited by appellants (*Flexner v. Farson,* 248 U.S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250, and *Doherty & Co. v. Goodman,* 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097) have nothing to do with this issue, but only with whether a "nonresident" association is present in a state sufficient to require it to answer and be bound by a suit in the courts of that state. Thus their considera-

tion properly comes under the next point of this section immediately below.

2. As to service.

Passing over the question whether a union can properly be compared to a corporation or an unincorporated association "doing business", which implies profit or the pursuit of gain (Restatement Conflict of Laws, Section 167(a); *Zonne v. Minneapolis Syndicate,* 220 U.S. 187, 31 S. Ct. 361, 55 L. Ed. 428) the gist of appellants' complaint here is that the service of process upon a nonresident unincorporated association was made easier if the court below was a "district court of the United States" within the meaning of the Act than if it was "any other court having jurisdiction of the parties," by reason of the provisions of Section 301(c). However, appellants' argument actually is that a labor union, as an unincorporated association, cannot be sued outside the state wherein it maintains its headquarters. Significantly, appellant International does not discuss the status of Albright, the International's employee who was served, but simply objects that it was served in a district other than that in which it has its headquarters.

At least since *Sperry Products, Inc. v. Association of American Railroads,* 132 F. (2) 408, cert. den. 319 U.S. 744, 63 Sup. Ct. 1031, 87 L. Ed. 1700, no doubt has been entertained that an unincorporated association can be sued in a district other than that in which it maintains its headquarters or principal office:

> "The pertinent part of the above (Sperry) decision is the court's recognition that an unincorporated association may be sued in a district other than where it maintains its principal office." *Thermoid Co. v. United Rubber Workers of America,* 70 F. Supp. 228, 234.

Indeed the recent case cited by appellants from the district court in New York (*Daily Review Corp. v. I. T. U.,* 26 L.R.R.M. 2503, 18 C.C.H. Labor Cases, par. 65,931) confirms this view completely. Appellants, in abstracting that case[54], note the distinction between that and the instant situation where the International ~~which~~ had its representative permanently stationed in Alaska, where they say:

> "The organizations had neither an officer *nor a representative* in New York, . . ." (Emphasis supplied)

There plaintiff simply served the president of the defendant, apparently on a temporary sojourn in the state, without any other identification of the defendant with the state. It is significant that as authority the case cites *Philadelphia & Reading Ry. Co. v. McKibbin,* 243 U.S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Davega, Inc. v. Lincoln etc. Co., Inc.,* 29 F. (2) 164 and *Amtorg Trading Corp. v. Standard Oil of California,* 47 F. Supp. 466, in all of which cases the defendant corporations had no connection with the state in which service was attempted. In the first two cases the presidents of the corporations were served while on temporary trips in the state, and in the third, service was attempted on a subsidiary corporation which was doing business in the state, although its parent was not. Thus, rather

[54]Appellants' brief. p. 77.

than supporting appellant International's position, the cited case and its authorities controvert it, since by holding service invalid because the defendant carried on no activities and had no representative in the place it was sued there is a positive indication that if the contrary had been true the service would have been good. It certainly is not authority that a union cannot be sued in any other district than that in which it has its headquarters.

Flexner v. Farson and *Doherty & Co. v. Goodman, supra,* cited by appellants as hereinabove noted, are inapt for this same reason. Moreover, appellants do not correctly read and state the decision in the *Doherty* case (Br. 75, footnote 40). The qualifications there were not those the Supreme Court insisted upon, but those of the Iowa statute.

Conceding, for the purpose of argument, that the same "due process rules" are applicable here as are applicable in straightforward questions of whether a corporation or an association is "doing business" in a foreign state sufficient to subject itself to process there, the issue is the nature of the activities conducted in the place where the court is asked to hear the issue and enforce its judgment, or whether a defendant has

> ". . . certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notices of fair play and substantial justice.'" (Citing cases)

International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057.

It should be noted that appellant International was not brought in by service on Local 16. Its "Alaska representative," Verne Albright (Tr. 162, 273), was the person upon whom service was had to bring in the International. He was employed by the International to "service" and advise all of the locals of the International Longshoremen's and Warehousemen's Union in Alaska (Tr. 954). He made regular reports to the International at San Francisco (Tr. 956, 957). We will forbear further reference to Albright's status for this purpose, since further references to the activities of Albright elsewhere in this brief, as well as the facts here noted, amply sustain the service upon the International through him as an employee of the International who

> ". . . has such a relation to it that it could reasonably be expected that if served with process he would give notice of the suit to the association." *Operative Plasterers, etc., Ass'n v. Case,* 93 F. (2) 56, 67.

Nor does appellant International argue that Albright was not such a person.

That appellant International was amply and early advised of the service upon Albright is unquestioned; for "This service, as a matter of fact, did bring the brotherhood in, fighting." *Tunstall v. B. of L. F. & E.,* 148 F. (2) 403, 406. Pleadings were filed on the International's behalf in the name of its attorneys, as well as the attorney for the local in Juneau, within the time required of a diligent defendant.

But in addition, and conclusively against appellants, it is perfectly clear that appellants' demurrer raising the

question of lack of jurisdiction over the persons of the appellants *and* the subject of the action, constitute a general appearance by appellant International, as well as Local 16.

Despite the confusion in order in the Transcript of Record herein, and certain statements of questionable inference made by appellants in their "Jurisdictional Statement", all of which are pointed out in an earlier portion of this brief, the original record in this case will show that Verne Albright, the representative in Alaska for appellant International, was served October 20, 1948. On November 20, 1948, a general demurrer, only, was filed by both appellants (Tr. 15). That demurrer was argued December 31, 1948, and taken under advisement.

Then, on January 3, 1949, after filing of the general demurrer and argument thereon, appellants filed a special appearance and motion to quash service of summons, together with a motion for leave to withdraw their demurrer. In overruling the demurrer of appellants the Court also denied the special appearance and motion to quash and motion for leave to withdraw demurrer (Tr. 21, 22). It is, of course, within the discretion of the trial court whether a defendant will be relieved of the effect of a general appearance and allowed to appear specially for contesting jurisdiction over his person. *Brookings State Bank v. Federal Reserve Bank of San Francisco,* 291 F. 659.

Because appellants first filed a general demurrer in the court below, questioning not only the jurisdiction of the court over their persons but over the subject mat-

ter of the action, *United States v. Yakutat & S. Ry. Co.*, 2 Alaska Rep. 628, is decisive that they appeared generally in the cause and waived any objection to the court's jurisdiction. In that case an indictment was returned against the railway and a bench warrant of arrest issued. The railway attorneys appeared specially and moved to quash service on the ground that the court had no jurisdiction over defendant's person, and for the *further* reason that the offense charged in the indictment could not be committed by a corporation. In denying the motion to quash service, the court held that by attacking the subject matter of the indictment in its motion, the defendants had waived their jurisdictional objections and had made a general appearance.

See also *Dickey v. Turner,* 49 F. (2) 998, 1001, and *Chesapeake & Ohio Ry. Co. v. Coffey,* 37 F. (2) 320, 323. Since the rule above announced is uniform it is unnecessary to multiply authorities on the question.

It thus plainly appears that the validity of the service upon appellant International in this case was neither made easier nor possible only if the Alaska court was a "district court of the United States" within the meaning of the Act. The International could have been sued as an entity either in the federal courts or in a state court by reason of the fact that a federal right, of the same character as the treble damage section of the Sherman Act (15 U.S.C.A. § 15), was here an issue. *U. M. W. v. Coronado Coal Co., supra; Williams v. U. M. W., supra.* And service upon it elsewhere than in the state in which its headquarters were located was not dependent upon the status of the court, but upon the nature of its activi-

ties in the place in which it was summoned to appear before that court. The law on this point was not dependent on, but wholly independent of, the Act.

Nor is the reason far to seek. In conferring upon the federal courts the right to hear and decide breach of contract cases in Section 301 Congress was not dealing with a right conferred by federal law, but only making available to such suits the federal courts without the bars of diversity and jurisdictional amount. Thus the law of the district in which the court was located determined, absent the provisions of Section 301, whether the union could be sued as an entity. In such "common-law" suits, therefore, Congress provided that a union could be sued as an entity. But no such provision was necessary in Section 303(b). And since there was and is, as hereinabove noted, no question of service upon such entity in any district in which it is carrying on continuous activity of a character sufficient to subject it to the court's process, nothing further was added in this respect either in Section 301 or 303.

Thus, insofar as the International was concerned, no provision of the Act in question validated or invalidated the service of summons upon it, but the issue was solely determinable by the nature of its activities in Alaska and the status of its agent who was served. No argument is made, or could be, that the service was wanting in validity because of deficiency in either of these tests.

3. As to agency.

Nor did the court's rulings on agency depend for

validity on its status as a "district court of the United States" or "any other court having jurisdiction of the parties." For here, as in the preceding two points, appellants have mistaken the law. Section 301(e) simply says that in all cases under that Section the common-law rules of agency apply. Since a fuller discussion of the correctness of the lower court's rulings and instructions on agency is contained elsewhere in this brief, it is sufficient to say here that the agency rulings and instructions were based on the common-law rules which are the same, whichever of the two designations of Section 303(b) the court conceived for itself.

When the Act was before the Senate after conference, the Chairman of the Senate Labor and Public Welfare Committee and Chairman of the Conference Committee of the Senate, inserted in the Congressional Record a memorandum of the meaning of the language here considered. Because that statement is so conclusive upon the point it is worthy of reproduction here (2 Leg. Hist. 1622):

> "Section 2(2) to (13), and Section 301(e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act, 'anyone acting in the interest of an employer' and inserted in lieu thereof the word 'agent.' The term agent is defined in Section 2(13) and Section 301(e), since it is used throughout the unfair labor practice sections of Title 1 and in Sections 301 and 303 of Title 3. In defining the term the conference amendment reads, 'The question of whether the specific acts performed were actually authorized and subsequently ratified shall not be controlling.' *This restores the law of agency as it has been developed at common law.*

"These amendments are criticized in one breath as imposing too harsh a liability upon unions for the acts of their officers or representatives and as too mild with respect to the liability of employees for the acts of their managerial and supervisory personnel. Of course, the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of the *United States v. United Brotherhood of Carpenters* placed upon Section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need to do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming any such responsibility. *The conferees agreed that the ordinary law of agency should apply to employer and union representatives.* Consequently, when the supervisor acting in his capacity as such engages in intimidating conduct or illegal action with respect to employees or labor organizers, his conduct can be imputed to his employer regardless whether or not the company officials approved or were even aware of his action. Similarly, union business agents or stewards, acting in their capacity as union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct." (Emphasis supplied)

And this is, of course, exactly what the language of

the statute does. Norris-LaGuardia Act in Section 6 (29 U.S.C.A., Sec. 106) excepts the union's responsibility:

> ". . . except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Section 301(e) restores the common-law rule by providing:

> "(e) For the purposes of this action, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

For the vice of the Norris-LaGuardia Act, as the dissenting minority in the *Carpenters* case (330 U.S. 395) and the Congress saw it, was that no agent is ever actually authorized to commit an unlawful act, and after it has been committed and *actual* knowledge of it and its effect is obtained, no ratification could as a practical matter ever be shown.

Thus the common-law rule discussed ~~*supra*~~ *post* under Point III A of this brief, that the principal will be bound so long as the actions of his agent are within the general scope of the latter's employment, was restored. That rule is best expressed by the Supreme Court thus:

> "It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. (Citing cases)
>
> "And this is the rule when the act is done by the agent in the course of his employment, although done

> wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct." *New York Central & H. R. Railroad Co. v. United States,* 212 U.S. 493, 29 S. Ct. 304, 306.

Thus the real basis of the International's complaint here is not that the rulings as to the trial court's status deprived it of the benefit of the common-law rules of agency, which the court applied at the trial (see pages 76 to 83, appellee's brief), but that appellant did not have the benefit of the preferential rules of agency. But the International was entitled to no such preference, whichever status the Alaska court had. Whether it was a "district court of the United States" or "any other court having jurisdiction of the parties," it was bound either by the Act or the common law to apply, and did apply, the common-law rules of agency.

Appellants' suggest (Br. p. 79, footnote 43), however, that perhaps the district court below was bound to apply the restrictions of the Norris-LaGuardia Act respecting liability for an agent's acts because the Alaska court, being "any other court having jurisdiction of the parties," and thus not subject to the "limitations and provisions" of Section 301, was not freed of that Act's restrictions as were "Article III" courts.

In the first place, of course, appellants disregard the decision of this Court in the *Wirtz* case, *supra,* holding

that that Act inhibits "Article III" courts only, which concededly the court below is not. Thus, the Norris-LaGuardia Act and its restrictions on the common-law rule of agency are by that decision inapplicable to the Alaska court.

In addition, appellants' assumption that the "limitations and provisions" of Section 301 apply only to "Article III" courts seems clearly unfounded. Rather, those limitations and provisions apply equally to either "district courts of the United States" or "any other court having jurisdiction of the parties." If it were otherwise, as we have pointed out in Part II A 1 of this brief, the *restriction* that a money judgment issuing out of a federal court in the States would be enforceable only against the union treasury, would not be applicable to a judgment issuing from a State court or a territorial court, which would be enforced as well against the assets of all the union members. The only way to avoid this ridiculous anomaly, which was clearly not intended, is to construe the "limitations and provisions" of Section 301 to apply to both classes of courts mentioned in Section 303(b).

For the foregoing reasons appellants were not prejudiced in any way by the trial court's rulings in the three respects of jurisdiction, service or agency. Whether the Alaska court had the status of a "district court of the United States" or "any other court having jurisdiction of the parties," its rulings were required to be, and were, the same. Since a federal right was involved, appellants could be sued as entities in whatever court they were required to appear. And not the status of the court, but

the nature of the International's activities and the status of its resident representative as one who could be expected to see to it, as he did, that the International received notice of the suit, was in issue. And lastly, whatever status it occupied the court below was bound to, and did, apply the common-law rules of agency.

Between them the two designations of courts entitled to hear and decide a cause of action for damages on account of the activities described in Section 303(a), comprehended every status which the Alaska court could occupy. Appellants do not argue that the court below was not of the second class named in Section 303(b), but simply, that being so, they, and especially the International, should have had different rulings in respect to the three main points than if it had been the court first described in that subsection. But nowhere does the law bear out their contentions. Instead, where the issue involved was the cause of action created in Section 303, the rulings of the court on these issues could not have varied, whatever its status. Accordingly, no error whatever was committed by the trial court, prejudicial or otherwise, in this respect.

III.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY

A. There Was No Error in Giving the Instructions (Specifications of Error III(b), (d), (e) and (f)) of Which Appellants Complain.

1. Any error in instructions 6 and 7 and in supplementary instructions 3 and 4 would be harmless since there was no issue of liability for the jury.

Appellants' Specifications of Error III(b), (d), (e) and (f) deal with claimed errors in instructions 6 and 7 and in supplementary instructions 3 and 4. Each of these instructions dealt with the circumstances in which the jury might find the appellants liable to appellee. Since the evidence established conclusively that each of the appellants was liable to appellee, the court should have instructed the jury that there was no question of fact with respect to the issue of liability, as appellee requested (Tr. 1036). Accordingly, whether the instructions actually given were erroneous in any respect is a matter of only academic interest.

Paragraph VII of the second amended complaint charged both the appellants as follows:

> "From about April 10, 1948, until the present time *defendants* have unlawfully engaged in, and induced and encouraged plaintiff's employees at Juneau, Alaska, and employees of other employers, to engage in a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities of plain-

tiff, or to perform any services for plaintiff." (Tr. 5) (Emphasis supplied)

In paragraph VIII appellee charged:

> "An object of *defendants* in their activities described in paragraph VII above has been, and is, to force and require plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons, including members of Local M-271, to whom said work has heretofore been assigned. Neither of said defendants has been certified by the National Labor Relations Board as the bargaining representative for employees performing such work." (Tr. 5, 6) (Emphasis supplied)

The necessary elements to establish liability against appellants were:

1. That appellants engaged in, or induced plaintiff's employees or employees of other employers to engage in concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities of plaintiff or to perform any services for plaintiff.

2. That an object of appellants was to force and require appellee to assign the work of loading its barges to members of Local 16, rather than to other persons.

It was conceded at the trial that the Company had assigned the barge loading work to its mill employees; that Local 16 attempted to induce appellee to assign the work to its members; that on April 10, 1948, when appellee refused to comply with the demands of Local 16, it placed pickets at appellee's plant and induced appellee's employees to respect the picket line (Tr. 835, 855,

864). Substantially similar admissions were contained in the answer of the Local (Tr. 26 and 27). As a result, appellee's mill was compelled to close (Tr. 411). Thus there was no issue as to the liability of the Local.

Neither was there an issue for the jury as to the participation of the International. That agents of the International had worked to induce both appellee's employees and employees of other employers to refuse to handle appellee's products was shown by an abundance of uncontradicted and convincing evidence. It was also clear that the object of this activity was to force appellee to assign the work of loading barges to members of the Local. One of the earliest demands upon appellee for all the work "from the bull rail out," which included barge loading, was made by Mr. Albright, International representative of I. L. W. U. for Alaska (Tr. 162-167).

Under the pretext that it was customary practice all along the coast, further demands were made for additional work in October, 1947, by Germain Bulcke, International Vice President of I. L. W. U. (Tr. 574). The reason for the interest of the International was the belief that if barge loading was permitted by mill employees it would set a precedent for other ports (Tr. 424, 425, 426, 781, 965, Plaintiff's Ex. 17).

Mr. Albright was representative of the International for the Territory of Alaska (Tr. 273). Appellants' own testimony established that Albright's duties, as representative for the International, consisted of assisting and advising all of the locals in Alaska (Tr. 954). It was his duty to assist in labor relations and negotiations between I. L. W. U. locals in Alaska and employers, to provide service to I. L. W. U. locals in Alaska in the sense of advising them on labor relations matters and other problems they might have (Plaintiff's Ex. 19).

Mr. Albright came to Juneau in early May, 1948, pursuant to that employment, to assist Local 16 in its dispute with appellee (Tr. 946-947). From that time forward Albright acted as a leader of the activities of the local (Tr. 974-984) . During the period in which he was assisting the local, Albright made regular reports with respect to the progress of the dispute at Juneau to the International (Tr. 956-957). Albright remained on the payroll of the International (Tr. 954). Albright made numerous efforts to persuade appellee's employees to refuse to work (Tr. 957-984). Thus it was established that while acting within the scope of his employment by the International and doing the very things that he was hired to do, Albright performed unlawful acts of which appellee complained.

Albright's testimony that he was acting for Local 16 while in Juneau does not raise an issue of fact as to whether he was acting within the scope of his employment with the International, in view of his testimony that it was his job to aid and assist the locals.

In addition to the activities of Mr. Albright the evidence established specifically, and without contradiction, that the International, through its vice president, Germain Bulcke, instructed all Canadian locals that appellee's products were unfair and this information was disseminated among the membership through the official I. L. W. U. newspaper (Plaintiff's Ex. 24; Tr. 973-979). The International, through its Canadian representative, John Berry, instructed Local 505 at Prince Rupert, not to handle appellee's products (Tr. 620-21; 624-27). This instruction was given pursuant to information received by Mr. Berry from his San Francisco office (Tr. 621). As a result the Canadian longshoremen refused to unload appellee's lumber in Canadian ports (Tr. 611-633). The attitude and participation of both defendants remained unchanged even at the time of the trial. Members of Local 16 continued their picketing (Tr. 411), and on May 2, 1949, while the trial was in progress, John Berry, acting on orders received from his headquarters in San Francisco, again refused to permit lumber to be unloaded in Prince Rupert, despite the ruling by the National Labor Relations Board that Local 16 was not entitled to the work of loading appellee's barges (Tr. 626).

Aside from this direct evidence, there was circumstantial evidence of a convincing character that Local 16 received the active aid and assistance of the International in its unlawful activities. Repeated threats that barges loaded by sawmill workers would be followed (Tr. 763) and would not be unloaded in Canada or the United States (Tr. 221, 299, 444) proved to be well founded in fact. When a barge load of lumber, shipped in August, 1948, arrived at Prince Rupert, the longshoremen there refused to unload it on orders from Mr. Berry (Tr. 621). Appellants succeeded in unloading the barge at Tacoma, which was one of the few Pacific Coast ports not controlled by the I. L. W. U. (Tr. 687, 274). But a second barge sent to Tacoma in September, 1948, remained in Tacoma for over six months and was not unloaded until during the course of the trial (Tr. 437-438, 687).

Aside from Mr. Albright, who was subpoenaed by the appellee to attend the trial (Tr. 275), appellants failed to produce any witness to deny or explain the interest of the International or the activities of Mr. Berry or Mr. Bulcke. Appellants also failed to produce or offer any correspondence or reports which might disclose a lack of participation by the International. Albright denied having any such records and said there were no such records in Alaska (Tr. 277-78).

It is the rule that every party to a concerted endeavor or conspiracy is deemed in law a party to all acts committed either before or after his entrance into the concerted activity by any other party in furtherance of the common design. *Silliman v. Dobner,* 165 Minn. 87, 205 N.W. 696; *Patch Manufacturing Co. v. Protective Lodge,* 77 Vt. 294, 60 Atl. 74. Thus, even if it could be argued that the International was not acting in concert with the local from the very outset of the dispute with appellee, the International would, nonetheless, be liable for the whole of the damage which appellee suffered because of its subsequent concerted action with the local.

The evidence outlined above was not contradicted by the appellants in any way and was of a persuasive and convincing character. It established conclusively the allegations of appellee's complaint against both appellants insofar as concerned the issue of liability. Since a reasonable juror could not have disbelieved the evidence, the court would have been justified in submitting only the issue of damages to the jury. *Town of Orleans v. Platt,* 99 U.S. 676. Accordingly, any errors of language which may have been used by the court in submitting the issues other than damages, were nonprejudicial and harmless error.[55] Since a harmless error is not a reversible error, the Court need not scrutinize instructions 6 and 7 and supplementary instructions 3 and 4 for error. Actually, however, the instructions were correct and proper.

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[55] *W. B. Grimes Dry-Goods Co. v. Malcolm,* 58 Fed. 670-672 (C.C.A. 8th), 164 U.S. 483, 17 Sup. Ct. 158; *Hinds v. Keith,* 57 Fed. 10-15 (C.C.A. 5th); *New York N. H. & H. R. Co. v. O'Leary,* 93 Fed. 737-742 (C.C.A. 1st).

2. The instructions given were proper.

Appellants' statement that before the International could be found liable the evidence had to show that the International's agents engaged in unlawful activities (Br. 82) is correct. Throughout appellants' entire argument appellants have overlooked completely the abundance of evidence, outlined above, that the agents of the International, acting in concert with agents of the Local, did engage in unlawful activities as charged in appellee's complaint. This oversight pervades and nullifies nearly every contention which appellants make.

Instructions 6 and 7

In instruction 4 the court told the jury that the International would be bound only by acts performed by its agents while acting in the scope of their employment. The court pointed out that it was undisputed that Bulcke, Berry and Albright were agents of the International, but left it to the jury to say whether such persons were acting within the scope of their employment while performing any unlawful acts which might be established by the evidence (Tr. 49-50). Appellants concede that the instruction correctly stated the law of agency except in a particular not here material.[56]

In instructions 6 and 7[57] the court informed the jury of the nature of joint liability. It explained that if the two appellants, *through agents who acted within the*

[56]See pages 78 to 82.

[57]Set forth in appellants' brief at pages 18 to 20 and in the transcript of the record at pages 51 to 53.

scope of their employment, entered into a conspiracy or understanding to commit the acts of which plaintiff complained, or acted jointly or in pursuance of a common design or purpose, then the acts of the agents of either appellant in furtherance of the conspiracy or understanding would be binding upon both appellants. If one appellant directed, advised, encouraged, procured, instigated, promoted, or aided or abetted wrongful acts of the other, the appellants would be jointly liable for the whole of the damage thereafter sustained by appellee.

Appellants did not except to instructions 6 and 7 on the ground that they incorrectly stated the law nor on the ground that there was not sufficient evidence to warrant giving the instructions. It may not be disputed that the act of one of several conspirators or joint venturers, after the formation and during the existence of the conspiracy or venture, is attributable to all. *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.,* 73 F. (2) 333 (C.C.A. 6th). And each party to a general plan is jointly and severally liable for all damage resulting from the conspiracy. *Lewis v. Ingram,* 57 F. (2) 463 (C.C.A. 10th), *cert. den.* 287 U.S. 614, 53 S. Ct. 16. Each party to the concerted action is vicariously liable for the acts committed by his co-venturers, just as a principal is liable for acts of his agents within the scope of their employment. Prosser, Torts, states at page 1094:

> "The original meaning of a 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result. In such a case there was a com-

mon purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that 'all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present.' Each was therefore liable for the entire damage done, although one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons. All might be joined as defendants in the same action at law, and since each was liable for all, the jury would not be permitted to apportion the damages. . . .

"This principle, somewhat extended beyond its original scope, is still law. All those who actively participate in a tortious act, by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. Express agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it be a tacit one. . . .

"It is in connection with such vicarious liability that the word conspiracy is often used . . ."

It was on the theory that each of appellants, acting in concert, performed unlawful acts for which each ~~were~~ was jointly liable that appellee tried its case. As shown above there was ample evidence that the appellants worked jointly to force appellee to assign the work of loading barges to members of Local 16. Appellee was entitled to have its theory of the case submitted to the jury.

As the trial court pointed out, appellee might have proceded on the additional theory that each of appellants acted independently of each other in wronging appellee (Tr. 1045). Under such theory the International might have been held and the Local absolved. Appellee did not proceed on this theory because the

evidence so overwhelmingly indicated that the appellants acted jointly. Appellants cannot complain that the instructions of the court permitted the jury to hold the International without also holding the Local, since the jury indicated by its verdict against both appellants that it considered the appellants jointly responsible.

Appellants urged only two objections to instruction 6 at the trial:

(1) The reference to a conspiracy was improper under the pleadings (Tr. 1053): and

(2) Under the terms of the instructions the International could be found liable and the Local absolved (Tr. 1055).

Although appellants' argument is not entirely clear, appellants appear now to assert for the first time that instruction 6 should have contained a warning that the acts of Verne Albright would not bind the International unless Albright was acting within the scope of his employment as an agent for the International while performing such acts. If this be appellants' position, appellants should have so stated at the time they excepted to instruction 6 in order that the court might have had an opportunity to consider modifying its instructions. It is well settled that a party may not urge on appeal an error in an instruction unless he excepts thereto at the trial and states distinctly the grounds of his objection. *McNitt v. Turner,* 83 U.S. 352; *Pacific Telephone & Telegraph Co. v. Hoffman,* 208 F. 221, 228 (C.C.A. 9th); *Novick v. Gouldsberry,* 173 F. (2) 496, 500 (C.C.A. 9th).

Instruction 6 was proper in any event. Appellants concede that instruction 4 contained an accurate statement of the common law rules of agency (Br. 82). In the second paragraph of instruction 6 the court reminded the jury that appellants were responsible only for the acts of their agents "acting within the scope of their employment." In addition, in instruction 14 the court cautioned that all of its instructions were to be considered as a whole. Thus the jury could not have been misled.

The only criticism of instruction 6 contained in appellants' brief which was also urged during the trial is that the complaint did not charge appellants with conspiracy (Br. 87). In their argument appellants assume that under the pleadings the International is charged only with responsibility for acts performed by its own agents (Br. 87). Paragraphs VII and VIII of appellee's complaint, however, clearly charge both appellants jointly with unlawful activity (see page 68, *supra*). Furthermore, paragraph IX charges that both appellants are responsible for the whole of the damage sustained by appellee (Tr. 6). Thus, appellants have at all times been on notice that they were charged with a joint tort.

There is no uncertainty in the word "conspiracy." Black's Law Dictionary (3d ed.) defines the word to mean "a combination or confederacy between two or more persons formed for the purpose of committing, *by their joint efforts,* some unlawful . . . act . . ." (Emphasis supplied). See also *Karges Furniture Co. v. Amalgamated Woodworkers Local Union,* 165 Ind. 421, 75 N.E. 877. It is not necessary for a plaintiff to allege

the combination in his pleadings in order to rely upon it. In 15 C.J.S. 1037 it is stated:

> "The conspiracy, not being the gravamen or gist of the action, . . . an allegation of the conspiracy does not in and of itself allege a cause of action, and, ordinarily it need not be alleged in order to impose liability for the wrong on all who have conspired to commit it . . ."

See also *Dickson v. Young,* 202 Iowa 378, 210 N.W. 452.

Appellants were free in advance of trial to use the devices provided by the Alaska rules of procedure to ascertain the evidence upon which appellee relied in support of its charge. All through the trial appellee's efforts were directed toward proving that the trouble in Juneau was merely part of a coastwise effort of the International to control all loading of vessels. For example, appellee's witness Flint testified that a settlement proposed on one occasion fell through because Albright feared its effect on a dispute at another port (Tr. 426). Some of the earliest demands that appellee assign the work of loading barges to the Local were made by Albright and the International's vice president, Bulcke. Appellee's evidence that Albright and an officer of the Local went to Prince Rupert shortly before the Local there refused to unload a barge should have advised appellants further that appellee contended they were working to enforce a program agreed upon between the two unions (Tr. 787-788). The same can be said of the evidence that the refusal of the Canadian locals to handle appellee's lumber was pursuant to orders direct from San Francisco (Tr. 621).

Instructions 6 and 7 correctly informed the jury that if it found that the appellants acted in pursuance of a common design, each would be responsible for the whole of the resulting injury, whether or not the whole injury could be attributed directly to the activity of the particular appellant. Appellants presumably knew this to be the law and cannot complain that they did not have adequate opportunity to meet appellee's evidence.

Appellants did not except to instruction 7 at the trial and are precluded from now asserting that the instruction was improper. In instruction 7 the court charged that one who directs, advises, promotes, aids or abets *a wrongful act* by another is as responsible therefor as the one who commits the act. Appellants argue (Br. 86) that the court's statement was broad enough to permit the jury to hold the International on the basis of Albright's assistance to the Local "in settling the dispute." There was no evidence of any efforts of Albright to settle the dispute except those efforts designed to compel appellee to submit to the Local's demands. If it is to these efforts to "settle the dispute" that appellants refer, their statement is undoubtedly correct for such efforts constituted wrongful acts. In such event, however, appellants' argument suggests no valid ground for holding the instruction improper.

Perry Norvell Co., 80 N.L.R.B. 225, upon which appellants rely (Br. 87-90) has no bearing whatever upon the issues with respect to instructions 6 and 7. In that case a local union was conducting a strike which the Board held to be a lawful strike. The Board found that

incidental to the strike certain members of the local engaged in unlawful attempts to coerce and intimidate their fellow employees. The members of the local were held to be agents of the local, but not of United, the national union involved. The national union was clearly involved in the strike which was a lawful activity. The Board found, however, that the national union had nothing whatever to do with the unlawful acts of members of the local incidental to the lawful strike:

> " . . . the record is barren of any evidence that any representative of United incited, committed, participated in, or even observed or knew of any of the acts of restraint or coercion which we have found were committed." 80 N.L.R.B. 247.

There was no such failure of proof with respect to the International in the present case. There was ample evidence that the International's agents Berry, Bulcke and Albright each participated in the unlawful acts charged in appellee's complaint. In these circumstances it was proper for the court to submit to the jury the issue of whether the International was responsible jointly with the local for the entire damage resulting from the unlawful activities of both appellants because of acts committed by the International's own agents.

Since in the *Norvell* case the combination of unions was for a lawful purpose, by definition no "conspiracy" was involved (see page 19, *supra*). When a combination is innocent in its inception but is afterwards perverted to unlawful ends, only those participating in the perversion are conspirators. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union,* 165 Ind. 421, 75

N.E. 877. Because in the present case the purpose of the combination between appellants was unlawful, appellants are responsible as conspirators.

Supplementary Instructions 2 and 3

After the jury had deliberated for some time it requested supplementary instructions. As part of supplementary instruction 2 the court told the jury that the evidence was undisputed that members of the Local engaged in the activity charged in appellee's complaint. Appellants do not challenge the accuracy of this statement.

The court then added:

> "The only issues which remain for your consideration are whether damages proximately resulted from such concerted refusal and whether the International engaged in this concerted refusal to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff. . . . ."

The effect of the quoted portion of the instruction was to remove from the consideration of the jury the question of whether the Local had engaged in the unlawful activity of which appellee complained, but to leave the question open as to the International.

In supplemental instruction 3[58] the court explained that appellants would be responsible for deeds performed by their agents while acting beyond the scope of their employment if appellants thereafter ratified such acts.

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[58]Set forth in appellants' brief, pages 22 and 23, and in the transcript of record, pages 1101 and 1102.

Consistently with instruction 2 the court told the jury, in effect, that by engaging in the concerted refusal the Local ratified the acts of its agents and that the issue of ratification was applicable only to the International.

Appellants contend that instruction 3 removed from the consideration of the jury the issue of whether damages proximately resulted from the unlawful conduct of the Local. However, appellants took no exception on this ground at the trial. Consideration of the portion of supplementary instruction 3 of which appellants complain in context with the remainder of the instruction, with supplementary instruction 2 (Tr. 1100-1101) and with instructions 8[59] and 9[60] (Tr. 53-54), makes clear the intent of the court to leave open the issue of damages. The court submitted its instructions in writing. It warned the jury not to single out one particular instruction and consider it by itself or separately from or to the exclusion of all the other instructions (instruction 14, Tr. 57). Thus the jury could not have been misled by supplementary instruction 3.

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[59]Instruction 8:

"No. 8

"If you should find that plaintiff is entitled to recover against the defendants or either of them, it will then become your duty to assess the amount of damages which plaintiff may have sustained. In such event your verdict should be in such amount as will fairly and reasonably compensate the plaintiff for the damage which it has sustained and which was proximately caused by the acts complained of, including any loss of profits which it is reasonably certain plaintiff would have received but for such acts."

[60]Instruction 9:

"No. 9

"By proximate cause is meant the probable and direct cause. It is the cause that sets in motion or operation another or other causes and thus produces the injury and without which the injury would not have occurred."

Supplementary Instruction 4

Appellants object to the following portion of supplementary instruction 4:

> "Ordinarily the question whether a certain act is within the scope of employment of an agent of a labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. Here the acts alleged are not of that kind." (Tr. 1102)

Appellants contend that the quoted portion of the instruction removed from the consideration of the jury the issue of whether the activities of Albright at Juneau were within the scope of his employment as an agent of the International.

By stating that, "Here the acts alleged are not of that kind," the court meant only to inform the jury that no acts of violence were charged. If appellants considered the statement to mean something different, they should have pointed out the ambiguity to the court at the time of trial in order that the court might correct it. Appellants excepted to the instruction only on general grounds (Tr. 1060).

In any event, the instruction did not, as claimed by appellants, direct the jury to find that everything done by Albright was within the scope of his employment by the International. This was specifically left as an issue for the jury to determine not only by supplementary instruction 4 but by other instructions. Even under appellants' interpretation the most that the instruction did

was to say that the acts in question did not appear to be foreign to or to bear but slight relationship to the employment. Since appellants conceded that it was Albright's duty, as International representative, to advise and assist locals, the instruction fitted the evidence perfectly.

The court qualified its remarks by stating that "ordinarily" the question of whether an act is within the scope of the employment of an agent depends upon whether it appears to be foreign to or bear but a slight relationship to the employment itself. By using the word "ordinarily" the court left open consideration of appellants' contention (not supported by the evidence) that in assisting and advising the Local in Juneau, Albright was not in this particular instance acting in the course of his employment by the International.

B. Appellants' Proposed Instructions on General Policies of the Act Were Properly Refused (Appellants' Specification of Error 3(g) and (i)).

Appellants argue in Part III(b) of their brief that appellee acted unreasonably in refusing to live up to a commitment it made to give its work to appellants' members, retreating behind its contract in justification of its refusal (Br. 94-98); and hence that they were entitled to the instructions here in question.

In this concept appellants incorrectly imply that a commitment to give appellants the work was made after appellee had contracted with the I. W. A. This is not correct. The conversation referred to was had some

months prior to the I. W. A. contract, and hence some months prior to I. W. A.'s conclusion that its recognition clause could and would include barge loading by yard employees (Tr. 181, 182). The alleged "agreement" between appellants and I. W. A. was not made until long after appellee had contracted with I. W. A. and had informed appellants that it would not accede to their demands.

Appellants quote from Evans' testimony to support their assertion that appellee was refusing to discuss the matter, much less bargain on it, and hence acting unreasonably. Of course, appellee had no right to bargain with appellants, who represented none of its employees. But Evans wrongly conceived, as do appellants, that appellee's assignment of work and its recognition of I. W. A. were of no significance, its duty being to stand neutral until I. W. A. and appellants reached a settlement, then accept it (Tr. 990, 993).

Two of the instructions proposed by appellants (Nos. 1 and 13) (Tr. pp. 34-36 and 43, 44) disclose on their face that they are taken from the "Statement of Policy" in Title I, the National Labor Relations Act, and the "Statement of Policy" in Title II, relating to the creation and duties of the Federal Mediation and Conciliation Service. As such, they simply proclaim the reasons for the provisions which follow. And as such they are nothing but abstract principles of law, unrelated to the complaint or evidence in this case. Numbers 1 and 13 of the proposed instructions were thus properly refused. *Irvine v. Irvine,* 76 U.S. 617, 19 L. Ed. 800; *Howard v. Capital Transit Co.,* 163 F. (2) 910, 912.

Requested instruction No. 12 refers to Section 204 of Title II, relating to good-faith bargaining between employers and employees or their representatives and disputes over contract terms, and hence is inapplicable here since it is in no sense a statement that employers and employees (which appellants concededly were not) should violate legal obligations to maintain industrial tranquillity.

Appellants' requested instruction No. 2 would have conveyed to the jury a double falsehood concerning the law and the facts applicable to this case. First, the reference to "demands" by I. W. A. was not in accord with the evidence. The I. W. A. had "demanded" that appellee turn over the work of loading its barges to the longshoremen only in the sense that a person placed in fear of his life "demands" that the thief take his pocketbook and watch. The barge-loading was a comparatively small part of the work and the jobs of more than 260 men were at stake. The I. W. A. "agreed" that the longshoremen should load appellee's barges because they feared the mill would be shut down and they would lose their jobs (Tr. 484); because they wished to avoid trouble (Tr. 829); because they feared violence if they should go through the picket line threatened by the longshoremen (Tr. 873); because they feared the effect of being blacklisted (Tr. 848); and because they were deceived by appellants into the belief that the longshoremen were also employees of appellee and entitled to the work (Tr. 407).

Second, the instruction would have conveyed to the jury the false concept that appellee had some duty, ex-

press or implied, to accede to the "agreement" of the I. W. A. that longshoremen thereafter load appellee's barges. Appellants concededly represented none of appellee's employees (Tr. 192, 298). They were simply outsiders unconnected with the employment relationship dealt with in the Wagner Act, as amended, seeking to intrude themselves between appellee and their brother C. I. O. union, the I. W. A., and take work away from the latter. Thus not only had appellee no duty to bargain with appellants, but it would have violated the provisions of Section 9(a) of the Wagner Act, as amended, in doing so, and if it had adhered to the early "agreement" entered into by the I. W. A. and the longshoremen in the circumstances above described, and thus displaced its I. W. A. employees with longshoremen, it would in addition have violated Section 8(a)(3) of the Wagner Act, as amended, by discriminating against its own employees because of their nonmembership in I. L. W. U.

Appellants' contention that the instruction was proper for the jury to consider in mitigation of damages is unsound for the same reasons. Moreover, the proposed instruction said nothing of mitigation of damages but would have required a defendants' verdict if applied by the jury.

Appellants say in effect that appellee was bound to violate the law, as well as breach its contract with I. W. A., in order to reach a "peaceful settlement," by which they meant outright surrender to their demands. The cases cited by appellants on mitigating damages have no reference to these circumstances. The duty to

act reasonably in not increasing the damages caused by another's wrong, referred to under Section IV of this brief, does not include the foregoing of contractual rights, and especially does not require that one violate the law. *Missouri Pacific Ry. Co. v. Baker,* 64 S.W. (2) 321 (Ark. 1933); *J. M. Huber Petroleum Co. v. Yake,* 121 S.W. (2) 670 (Texas 1938).

The cases cited by appellants (Br. 99-101) were founded on breach of contracts between employers and longshoremen and are distinguishable for that reason. There the employers could accede to the demands of the unions while awaiting a decision without prejudicing either their own rights or the rights of others. Appellee was in no similar position. Appellants were not agents of any of appellee's employees. The rule contended for by appellants would, in fact, if followed here, write the National Labor Relations Act out of existence, for that Act requires an employer to negotiate with representatives of his employees, and if agreement is reached, contract with them. If an employer, in order to minimize damages, were required to contract with a union concededly representing *none* of his employees, especially when he already had contracted with one representing a majority of all of them, the entire foundation of collective bargaining under the Wagner Act, as amended, would fall.

C. The Court Did Not Err in Failing to Instruct the Jury Concerning Section 8(c) of the Wagner Act.

In appellants' Specification of Error 3(j) it is as-

serted that the court should have given their requested instruction concerning Section 8(c) of the National Labor Relations Act, which provides as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of *an unfair labor practice* under any of the provisions of *this Act,* if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis supplied)

As a matter of fact appellants made no request for such an instruction (Tr. 34-45). The only reference in the record to Section 8(c) is the following, quoted from appellants' exceptions to the court's supplementary instructions:

> "Also, we object in so far as it relates to the International, that the question of the quantum of evidence necessary to prove principal and agency in order to hold the principal liable, is not adequately or properly set forth. The same objection we make to Instruction No. 3, that is with respect to the law applicable to proving principal and agent, and with respect to the word 'ratification' in the instructions. We again call attention to 8(c) of the Act upon which an instruction was requested, and which should have been embodied in that instruction. The same objection that we make to No. 3 we make to No. 4. It over-simplifies the possibility of settling responsibility on the International, with respect to the absence of quantum of proof to prove agency." (Tr. 1059, 1060)

This was not the equivalent of a requested instruction as shown by Section 57-7-61, Alaska Compiled Laws Annotated, which provides:

"Each party shall prepare and submit such instructions as he deems material to the case . . ."

The suggestion that Section 8(c) should have been incorporated in the court's supplementary instructions 3 and 4 is untenable. These instructions dealt with the subjects of scope of employment and authority of agents and ratification of their acts. The reference to the provisions of Section 8(c) in this connection would have been meaningless.

The nearest approach which we can find in the record to a request that the court instruct concerning the terms of Section 8(c), is appellants' requested instruction No. 5 (Tr. 37). But this would clearly have been an improper instruction. This Court has rejected the contention now advanced by appellants that picketing, for whatever purpose, is protected under this Act or the Constitution. In *Printing Specialties, etc., Union v. LeBaron,* 171 F. (2) 331, 334 (C.C.A. 9, 1949), this Court, in speaking of that section, said:

> "The section is inapplicable. Cf. United Brotherhood of Carpenters & Joiners of America v. Sperry, 10 Cir., 1948, 170 F. 2d 863. It is known to all the world that picketing may comprehend something other than a mere expression of views, argument or opinion. As conducted here it constituted an appeal for solidarity of a nature implying both a promise of benefit and a threat of reprisal. The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.' In this setting the picket line is truly

> a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information. The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the courts are entitled to concern themselves."

The statement in requested instruction No. 5 that there must be additional evidence that picketing was accompanied by acts of coercion or intimidation which caused appellee's employees to go through the picket line, finds no support in the statutes, in the Constitution or at common law.

There are other unsurmountable reasons why the court should not have instructed concerning Section 8(c) even if requested to do so in the manner provided by law. The italicized portion of Section 8(c) quoted above shows that its application is limited to "this Act," which means the "National Labor Relations Act" (Sec. 17). An "unfair labor practice" was in no way involved here. That is a charge for the Board, or the courts at the request of the Board, under the National Labor Relations Act. *Schatte v. International Alliance, etc.,* 182 F. (2) 158, 166 (C.C.A. 9, 1950). Thus an instruction concerning Section 8(c) would simply have promulgated one of appellants' erroneous conceptions of the Act hereinbefore mentioned. As pointed out in Part I of this brief, a suit for damages under Section 303 is not in any way affected or controlled by the substantive or procedural aspects of Title I of the Wagner Act. Section 8(c) of that Act relates only to proceedings before the National Labor Relations Board.

Moreover, Section 8(c) is not applicable, even in a Board proceeding under Title I, if the acts in question contain a "threat of reprisal or force or promise of benefit." The activities of the International which establish its liability were of this character. To paraphrase the language of this Court in *Printing Specialties, etc. Union v. LeBaron, supra,* one must be naive indeed to assume that the dissemination of the information in the "Dispatcher" that appellee's products were unfair was simply an exercise of the right of communication. Appellants do not deny having made the statements that appellee's lumber would not be unloaded (Tr. 444). They concede that Canadian longshoremen would not unload the lumber (Tr. 979). They did not offer any evidence to rebut appellee's showing that it could not unload its lumber anywhere on the Pacific Coast. The device by which this objective of appellants was accomplished was communication from both appellants to other locals in Pacific Coast ports, nearly all of which are controlled by appellant International,[61] that appellee's products were "unfair." In the setting of this controversy a reading of Section 8(c) of the Act would not have stated the law, even under Title I of the Act, to which it is alone applicable.

The case of *Grauman Co.,* 87 N.L.R.B. No. 136 (1949), relied upon by appellants, actually supports appellee's position. The Board there held that placing a *primary employer* on an unfair list would not amount to an unfair labor practice *in the absence of an intention*

[61]See list of ports contained *In The Matter of the Shipowners' Association of the Pacific Coast* (covering all west coast ports in the United States) 7 N.L.R.B. 1002, 1004.

by so doing to induce the employees of others not to work. Conversely, if the unfair list had such a purpose, it would be unlawful even as to a primary employer. The case therefore stands for the proposition that an unfair list, with an unlawful object, is enough to constitute an unfair labor practice regardless of the provisions of Section 8(c).

Here appellee was not the primary employer, or any other kind of an employer, insofar as concerned appellants. And the notification to Canadian locals that appellee's products were unfair was meaningless except as a means of inducing those locals not to work on appellee's products. This was an unlawful purpose.

IV.

THE TRIAL COURT'S RULINGS ON EVIDENCE DID NOT RESULT IN PREJUDICIAL ERROR TO APPELLANTS

A. The Court Below Was Right in Its Rulings on the Hearsay Objections.

This specification of error concerns the testimony of Freeman Schultz, a director and the manager of the appellee, concerning investigations made to determine the possibilities of getting appellee's lumber unloaded at various Puget Sound and Canadian ports (Tr. 692-696). Mr. Schultz made one trip himself, and relied upon the reports of his agents, whom he identified in his testimony, for the balance of his knowledge. Based upon

this information, he testified that Tacoma and Seattle were the only Puget Sound ports with adequate facilities for distributing the company's lumber, and that the lumber could not be unloaded at either of these cities or at Prince Rupert, British Columbia. He also testified that the company actually sent a tug and barge to Seattle, but was not successful in getting it unloaded.

Appellants objected to the admission of this testimony as conclusion, opinion and hearsay. The trial court excluded testimony with respect to what a company tugboat captain was told when he attempted to dock appellee's barges in Seattle, but admitted the balance of the evidence. Appellants assert that the trial court erred in the admission of this testimony because it was hearsay.

Mr. Schultz's testimony concerning information supplied by company agents to the effect that appellee could not get its lumber unloaded is termed hearsay by the appellants because the information was based upon investigations made by others. Appellants argue at pages 104 and 105 in their brief that the introduction of this testimony was prejudicial. Their brief states that the trial court recognized a duty of the appellee to mitigate damages (Tr. 719), and that appellee advanced inability to ship lumber as the reason for the closing of its mill. Therefore, appellants argue, the question of whether appellee was foreclosed from shipping was material to the jury's consideration of whether appellee had taken all reasonable steps to reduce its losses.

1. The trial court did not err in the admission of the testimony in question.

Appellee does not question appellants' assertion that it had a duty to mitigate damages. Consequently it had a right to show that it had made a reasonable effort to do so. This duty to mitigate damages, however, is a limited one. It is based upon the mores of decent human conduct, and does not require a plaintiff to explore every conceivable possibility of minimizing losses. "The efforts which the injured party must make to avoid the consequences of the wrongful act or omission need only be reasonable under the circumstances of the particular case, . . ." *Rathbone, Hair & Ridgway Co. v. Williams,* 59 F. Supp. 1, 4 (U.S.D.C.S.C. 1945). The sensible requirement that a plaintiff mitigate damages does not obscure the fact that it was the defendants who committed the wrong.

Professor McCormick aptly summarizes the scope of the duty to mitigate damages in his handbook, *McCormick on Damages,* at page 133. He states:

> "While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself,

> the person whose wrong forced the choice cannot complain that one rather than the other is chosen. Sometimes a reasonable man might consider that either active efforts to avoid damages or a passive awaiting of developments are equally reasonable courses. If so, a failure to act would not be penalized by the rule of avoidable consequences, even though it later appears that activity would have reduced the loss. It should not be assumed that only one course of conduct could reasonably have been chosen by the party wronged."

An injured party need not spend considerable money in doubtful attempts to minimize damages. *American Railway Express Co. v. Judd,* 104 So. 418 (Ala. 1925). He may recover if he acts reasonably even though greater exertions or knowledge on his part might have avoided the loss altogether. *Lovejoy v. Town of Darien,* 41 A. (2) 98 (Conn., 1945). "The duty does not extend to the necessity of going to extraordinary or unusual lengths to mitigate damages." *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.,* 184 P. (2) 183 (Calif. 1947). Accordingly, the only duty imposed upon appellee was one of reasonable conduct under the particular circumstances.

Therefore, the truth of the matter asserted in the information supplied to Freeman Schultz by company agents was not in issue. It was not incumbent upon the company to justify the closing of its plant by a showing that it had absolutely no possibility of shipping its lumber. It was only necessary for the appellee to show that the shutdown of the mill was reasonable under the circumstances. Testimony, which was not excepted to, showed that the company had reason to believe that it

could not ship. Lumber piled up at the mill docks, and appellee made efforts to increase its storage facilities (Tr. 696). Appellants' representatives made statements that company lumber would not be loaded (Tr. 281, 285, 287) or unloaded below (Tr. 221, 299, 443, 444). The company shipped a barge of lumber which was not unloaded at Prince Rupert or Tacoma (Tr. 436, 437, 438).

The testimony in question was offered for the purpose of showing, and did show, that despite these circumstances appellee, through the offices of its general manager, Mr. Schultz, conducted a further investigation of the possibilities of getting its lumber unloaded. Mr. Schultz made one trip himself. He commissioned responsible men, a company attorney in Portland, an employee of the State Steamship Co., and the Seattle District Manager for the State Steamship Company, to ascertain additional facts with respect to Puget Sound ports. He obtained similar information from the Building Supervisor for the Dominion Government with regard to the possibility of unloading company lumber in Canada. Mr. Schultz's informants were identified in the testimony, so that a jury could conclude that they were responsible men whose word could reasonably be relied upon by the appellee (Tr. 693, 694, 611). Accordingly, this testimony tended to establish reasonable conduct by the company irrespective of the truth or falsity of the information supplied to Mr. Schultz. It shows that the appellee conducted an investigation; received information from responsible sources: and acted in reliance upon it, thus satisfying its duty to mitigate damages.

Extrajudicial statements are admissible where the truth of the matter asserted is not in issue. *Cannon v. Chadwell,* 150 S.W. (2) 710 (Tenn. 1941); *In re Thomasson's Estate,* 148 S.W. (2) 757 (Mo. 1941); *Wagner v. Wagner,* 43 A. (2) 912 (Pa. 1945). In *Wigmore on Evidence,* Vol. VI at pages 177 and 178, Professor Wigmore states:

> "The theory of the Hearsay rule (ante, Sec. 1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, *but without reference to the truth of the matter asserted,* the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule."

Knowledge, belief, good faith, reasonableness or diligence on the part of a person may also be evidenced by extrajudicial statements. See Vol. VI, *Wigmore on Evidence,* section 1789 at page 235. "Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted is original and material evidence, and not mere hearsay." *Nick Bombard, Inc. v. Proctor,* 47 A. (2) 405 (Mun. Ct. of Appeals, District of Columbia, 1946). Accordingly, the testimony in question was admissible to establish the prudence and reasonableness of appellee's conduct in satisfaction of its duty to mitigate damages.

Appellants cannot complain that the evidence was introduced generally, because they made no request to have its admission limited. The general admission of evidence which is admissible for a particular purpose is not reversible error in the absence of a request for an instruction limiting the effect of the evidence. *Tevis v. Ryan,* 233 U.S. 273, 34 S. Ct. 481; *Riley Investment Co. v. Sakow,* (C.C.A. 9) 110 F. (2) 345; *Peerless Petticoat Co. v. Colpak-Van Costume Co.,* 173 N.E. 429 (Mass. 1930); *Barsha v. Metro-Goldwyn Mayer,* 90 P. (2) 371 (Calif. 1939). Appellants' objections to the admission of the evidence as hearsay did not constitute a request that the evidence be admitted for a limited purpose. *Thompson v. City of Lamar,* 17 S.W. (2) 960, 975 (Mo. 1929); *Bartlett v. Vanover,* 86 S.W. (2) 1020 (Ky. 1935); *Ward v. Town of Waynesville,* 154 S.E. 322 (N. C. 1930).

Therefore, the trial court did not err in the admission of the testimony in question. The evidence was clearly admissible to show the reasonableness of the appellee's conduct, and the appellants made no request for an instruction limiting its effect.

2. The introduction of the testimony in question was not prejudicial to the appellants.

The appellants were not damaged by the admission of the testimony in question. The evidence constituted new matter for the purpose of showing the reasonableness of appellee's conduct, but the probative force of the matter asserted was merely cumulative. Other testimony

showed that appellee could not get its lumber loaded at Alaska (Tr. 281, 285) and that a company barge was not unloaded at Prince Rupert or Tacoma (Tr. 788, 436, 613-619). Appellants' representatives had repeatedly made the statement that company barges would not be unloaded below (Tr. 221, 299, 443, 444, 620). The information supplied by company agents added nothing more.

Even the erroneous admission of testimony is not prejudicial if the effect of such testimony is merely cumulative. *Sunny Point Packing Co. v. Faigh,* 63 F. (2) 921 (C.C.A. 9, 1933), reviewing a decision of the District Court for the Territory of Alaska, Division Number 1; *Twachtman v. Connelly,* 106 F. (2) 501 (C.C.A. 6, 1939); *Braswell v. Palmer,* 22 S.E. (2) 93 (Ga. 1942); *Brown v. Montgomery Ward and Co.,* 8 S.E. (2) 199 (N. C. 1940).

Therefore, the introduction of the testimony in question was not prejudicial to the appellants.

B. The Court Below Was Right in Its Rulings and Instructions on the "Contract Question."

There are two reasons why appellants' proposed instruction No. 11 (Br. 26) was rightfully refused, and why the court's rulings in excluding evidence of appellants' alleged "prior contract" with Juneau Lumber Mills, Inc., from whom appellee purchased its properties, were correct.

First, the existence of a labor contract relating to the assignment or performance of work has no relevancy under the statute upon which this action was founded. A contract between appellants and Juneau Lumber Mills, whether taken over by appellee or not, would not justify the conduct of appellants under the law, for Section 303(a)(4), does not excuse a strike or boycott or an inducement to strike or boycott over a work assignment because of a union contract. The only defense of a labor organization committing the acts here charged, which appellants have not denied, is that the employer's assignment they seek to change is contrary to a certification of the National Labor Relations Board which has determined the representation of the employees performing such work. The statute adds no exception concerning an assignment contrary to a labor agreement, obviously because an employer is answerable to the union so deprived of the work under the provisions of Section 301(a), allowing actions for breach of contract.

Second, even if appellants had correctly construed the statute in their proposed construction, the law is that where there is a bona fide transfer of the physical assets of an employer (assuming *arguendo* that Juneau Lumber Mills, Inc. was such to the I. L. W. U. members on the facts appellants adduced), as contrasted with the purchase of the corporate stock, the labor contracts then in effect do not bind the purchaser of those assets. *Essential Tool & Dye Corp.*, 13 L.R.R.M. 1698; *Carouso v. Empire Case Goods Co.*, 271 App. Div. 149, 63 N.Y.S. (2) 35. The rule of those cases is amply satisfied by the facts relating to the sale of the assets of its predecessor

to appellee. No issue was raised below, by argument or proof, that appellee's purchase was not *bona fide* and wholly unrelated to any evasion of the obligation of any labor contracts or Board order. Cf. *N. L. R. B. v. Hopwood Retinning Co.*, 98 F. (2) 97; *Bethlehem Steel Co. v. N. L. R. B.*, 120 F. (2) 641. Nor was there any common identity between the purchaser and seller such as was found in *N. L. R. B. v. Adel Clay Products Co.*, 134 F. (2) 342.

Appellants' citations (Br. 107) on the proposition that the matter was one for the jury, in addition to being irrelevant for the reason first above suggested, are also completely inapplicable to the proposition for which they are cited and in issue here. In the first case the question whether there was a meeting of the minds between the parties when the defendant offered to buy five cars of sugar and the plaintiff agreed to sell him three, the defendant accepting the first car shipped, was held for the jury. In the second, the decision of a Referee in Bankruptcy was under consideration, the Circuit Court of Appeals holding there was an implied contract as a matter of law when employees worked after the expiration of a union contract and while negotiations for a higher wage were being conducted. The court allowed a recovery on a *quantum meruit* basis.

The first case has no relevancy to any issue here. The second has no application to a change of employer, since neither was there present. Hence they do not disturb the rule of the cases cited above by appellee.

Thus the requested instruction was not only wrong because of the terms of the statute under which appellee sued, but even if the statute read as appellants contend it should, there was nothing in the evidence upon which the court could have instructed the jury under the doctrine of the above cases. Therefore the court was correct in refusing the instruction and in its rulings on the claimed contract issue.

CONCLUSION

A review of the record in this case reveals that the trial was conducted with the utmost fairness to appellants and that the verdict of the jury was founded upon clear, convincing and, for the most part, uncontradicted evidence establishing all of the elements of appellee's case. No errors affecting the rights of appellants were committed by the trial court. The judgment should therefore be affirmed.

Respectfully submitted,

HART, SPENCER, MCCULLOCH, ROCKWOOD & DAVIES,
MANLEY B. STRAYER,
JAMES P. ROGERS,
FAULKNER, BANFIELD & BOOCHEVER,
Attorneys for Appellee.

APPENDIX

IN THE DISTRICT COURT FOR THE
TERRITORY OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

C. J. BURRIS et al., Plaintiffs, vs. VETERANS ALASKA COOPERATIVE CO. etc., et al., Defendants.	)	No. 5986-A ORDER OVERRULING AND SUSTAINING DEMURRERS

After argument of counsel for the respective parties, and good cause appearing in the premises, it is—

ORDERED that all of defendants' demurrers be and hereby are overruled, except the demurrer of Veterans Alaska Cooperative Company, a partnership, which is hereby sustained.

Done at Juneau, Alaska, this 5th day of January, 1948.

(Signed) George W. Folta
JUDGE

Presented by
William L. Paul, Jr. (Sgd.)
of attorneys for Plaintiffs
OK as to form
(Sgd.) R. E. Robertson
of Attorneys for Defendants
Entered Court Journal
No. 19—Page 46

Filed in the District Court for the Territory of Alaska, First Judicial Division, at Juneau, Alaska, January 5, 1949, 3:47 p.m.
(Signed) J. W. Leivers, Clerk

IN THE DISTRICT COURT FOR THE
TERRITORY OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

C. J. BURRIS, HELEN G. BURRIS, BRUCE CRUIKSHANK and RAY A DILLON, Plaintiffs, vs VETERANS ALASKA COOPERATIVE CO., and STEVE LARSSON HOMER, CARL W. HEINMILLER, MARTIN A. CORDES, JAMES N. TRELFORD, TRESHAM D. GREGG, JR., as officers and directors of VETERANS ALASKA COOPERATIVE CO., and as a copartnership doing business under the firm name and style of VETERANS ALASKA COOPERATIVE CO., and CARL O. COMSTOCK, DIRECTOR OF VETERANS ALASKA COOPERATIVE CO., and EDWARD C. KOENIG, JR., as an officer and director of VETERANS ALASKA COOPERATIVE CO., Defendants.	No. 5986-A MEMORANDUM OPINION Filed Jan. 4, 1949.

DAVIS & RENFREW, of Anchorage, and WILLIAM L. PAUL, JR., of Juneau, for plaintiffs.

SIMON HELLENTHAL and R. E. ROBERTSON, both of Juneau, for defendants.

The complaint alleges a conspiracy on the part of the individual defendants as directors of Veterans Alaska Cooperative Co. to defraud the stockholders of that corporation and the Port Chilkoot Co. by various acts

of malfeasance on their part as directors, and officers, designed to enable them to obtain possession and ownership of stock and physical assets without consideration in disregard of their fiduciary obligations, in fraud of the rights of stockholders and in violation of the operating agreement between the two companies. The prayer is for an injunction, an accounting, the removal of defendants as directors and officers, and the appointment of a receiver.

The defendant Veterans Alaska Cooperative Co., separately as a corporation and as a partnership, and the individual defendants have demurred to the complaint on the ground that the Court has no jurisdiction of the person or of the subject of the action and that the complaint does not state facts sufficient to constitute a cause of action. In support of the ground that the complaint does not state a cause of action, each of the several overt acts set forth in the complaint is separately dealt with and shown to be quite innocuous standing alone. This of course will not do. When measured in connection with the conspiracy charge their significance and sufficiency become apparent. Thus, the attempt to obtain $25,000.00 in stock of the Port Chilkoot Co. to be exchanged for a part of the physical assets of Veterans Alaska Cooperative Co. of far greater value, which were in the possession of the former under the operating agreement described, would seem quite innocent, but when it is projected against the conspiracy charge the fact that the attempt failed is immaterial in the face of the allegation of a continuing conspiracy. The attempt was an overt act in furtherance of the conspiracy and

designed to effect the object thereof, for, manifestly, if Port Chilkoot Co. had been obliged to make the exchange, its earning potential and its ability to meet its obligations under the operating agreement would to that extent have been impaired and Veterans Alaska Cooperative Co. would have suffered correspondingly in revenue. Similarly, the argument that the defendant-directors and officers should be permitted to exercise their judgment as to the acts set forth in par. XIV ignores the character imparted to such acts by the conspiracy charge.

The point is also made that, since there is no allegation in the body of the complaint that Veterans Alaska Cooperative Co. is a partnership or that the individuals designated in the caption as members are members of Veterans Alaska Cooperative Co., there is no jurisdiction over that organization as a partnership. This objection is well taken, and the demurrer of the Veterans Alaska Cooperative Co. *as a partnership* must therefore be sustained. The other demurrers are overruled.

(Signed) George W. Folta
Judge

Filed in the District Court for the Territory of Alaska, First Judicial Division, at Juneau, Alaska, January 4, 1949, 11:12 a.m.
(Signed) J. W. Leivers, Clerk

CERTIFIED COPY

United States of America,)
Territory of Alaska,) ss.
First Division.)

I, J. W. Leivers, Clerk of the District Court in and for the First Division, Territory of Alaska, do hereby certify that the hereto attached is a full, true and correct copy of the original MEMORANDUM OPINION AND ORDER OVERRULING AND SUSTAINING DEMURRERS IN CAUSE # 5986-A entitled C. J. BURRIS ET AL VS VETERANS ALASKA COOPERATIVE CO. ETC ET AL

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now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Juneau, Alaska this 9th day of October, A.D. 1950.

J. W. LEIVERS
Clerk.
By P. D. E. McIVER
Deputy Clerk.